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Equity Cases,

INCLUDING

Bankruptcy Cases,

BEFORE

THE MASTER OF THE ROLLS,

THE

VICE-CHANCELLORS,

AND THE

CHIEF JUDGE IN BANKRUPTCY.

EDITED BY G. W. HEMMING, BARRISTER-AT-LAW.

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NOTE AS TO THE REFERENCE TO RECORD NOW PRINTED WITH THE TITLE OF EACH CAUSE.

The Reference to Record, which is noted on the bill, gives the year of filing, the initial letter of the surname of first Plaintiff, and the consecutive number of the bills of that year and letter, and leads to the file of pleadings in the Record and Writ Clerk's Office.

The year, letter, and number, also lead to the entry of the cause in the Cause Books. The Cause Books commence in the year 1842. As to causes commenced before the 2nd of November, 1852, they contain the dates of pleadings and formal proceedings. As to subsequent causes they contain, in addition to these particulars, the dates of all decrees, orders, reports, and certificates made since the 30th of November, 1855. In these books there is entered against every decree or order a reference to the volume and folio of the Registrar's Books for the year, where the decree or order will be found *in extenso*.

No reference is written against reports or certificates, but the dates, extracted from the Cause Book, lead to the corresponding entries in the Volumes of Reports and Certificates, and the Index thereto.

The Cause Books are kept in the Record and Writ Clerk's Office.

The Registrar's Books and the Index thereto, and the Reports and Certificates and the Index thereto called the Calendar of Reports, are kept in the Report Office, a branch of the Record and Writ Clerk's Office under the same roof.

For the time of commencement of year in the "Registrar's Books," see 1 Seton, pp. 2, 3.

When the Reference to Record is not known, it may be found by searching for the necessary period the Index to Cause Books kept in the Record and Writ Clerk's Office.

In searching for decrees, orders, reports, and certificates made in causes commenced before the 2nd of November, 1852, or made in subsequent causes before the 30th of November, 1855, or made in matters, the old method must still be followed, viz.:

If a decree or order is required, search in the Report Office the Index to the Registrar's Books; if a report or certificate, search in the same office the Calendar of Reports. The Index to the Registrar's Books gives the reference to the Registrar's Books, and the Calendar of Reports the reference to the Volumes of Reports and Certificates.

Affidavits are filed in the Record and Writ Clerk's Office, where the Index thereto may be searched.

Petitions are filed in the Report Office, where the Index thereto may be searched.

Equity Cases

(*Including Bankruptcy Cases*)

BEFORE

THE MASTER OF THE ROLLS,

THE

VICE-CHANCELLORS,

AND THE

CHIEF JUDGE IN BANKRUPTCY.

KIMBERLEY *v.* DICK.

M. R.

1871

[1869 K. 20.]

June 8, 9, 12; *Nov.* 3.

Builder's Contract—Arbitration Clause—Agreement as to price between Architect and Employer—Extra Works—Complicated Account—Jurisdiction.

An architect entered into an undertaking with his employer that a house should be erected for a sum not exceeding £15,000, including architect's commission and all expenses, and engaged the services of a builder who, without being informed of the undertaking, gave an estimate based on quantities given him by the architect, and entered into a contract with the employer for the completion of the work from the architect's plans, and under his superintendence, for £13,690, with power for the architect to order extra works, and with a clause providing that all questions between the parties under the contract should be settled by the award of the architect—on a suit by the builder claiming to be entitled to be paid by the employer for all quantities executed by him beyond those included in his estimate, and for extra works:—

Held, that the account was too complicated to be taken at law, and ought to be taken in this Court:—

Held, also, that on the evidence the architect was the agent of the employer; that his undertaking having been concealed from the builder, the arbitration clause in the contract could not be enforced; and that the Plaintiff was

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entitled to an account for what was due to him for any works executed by him under the architect's direction not included in the contract, and for any works so executed under the contract the price for which was not therein included, and for any variations made under the architect's direction of works included in the contract.

THE Plaintiff in this case was *Alfred Kimberley*, a builder and contractor at *Banbury*. The Defendant, *William Wentworth Fitzwilliam Dick*, the member for *Wicklow*, was the owner of property at *Humewood*, in the county of *Wicklow*, on which the Plaintiff erected the mansion-house, the contract for which was the subject matter of the suit. The Defendant *William White* was an architect in *London*, employed by the first-named Defendant to design and superintend the erection of the house in question.

In 1866, the Defendant *Dick* being desirous of erecting a mansion-house on his property, and having heard of the Defendant *White* as an architect, requested his agent, Mr. *Fenton*, to write and ascertain the terms on which he would undertake the preparation of the plans and the superintendence of the work. Accordingly, in August, 1866, *Fenton* wrote to the Defendant *White* the following letter:—

"As Mr. *Dick* has never been engaged in any building operations, and is in some measure ignorant of the conditions on which architects usually enter upon an undertaking such as he contemplates, he is desirous to know the terms, to prevent any misunderstanding hereafter. It would be well if you named the conditions both for completing the entire building, or for merely coming to *Humewood*, and nothing more to be done, which is very unlikely."

The Defendant *White* sent an answer stating his terms, to which *Dick* assented, and at a subsequent interview informed him that he did not wish to expend more than £15,000, including architect's commission and other incidental charges. It was then arranged that *White* should prepare plans and elevations of buildings, of which the entire expense should not exceed £15,000. On the 27th of February, 1867, Mr. *White* sent, in pursuance of these instructions, plans and elevations, and a letter to the following effect:—

"February 27th, 1867.

"Dear Mr. *Dick*,—I am sending you the plans with the elevation

of the front. On the other side I give a summary of totals which I feel sure may be relied upon as a guide to the cost.

"Upon hearing from you I shall be prepared at once to go on with the plans and specification, and to produce a builder who would, I have no doubt, enter into a contract for the amount named.

Yours, very faithfully,

William White.

"Shell of house		£10,000
Fireplaces, bells, and other finishings . .		1,800
Contractor's estimate . . .	£120	
Clerk of works	360	
		480
		£12,280
Architect		620
Travelling expenses		60
House		£12,960
Total, say		£13,000
Stables—		
Shell	£2,000	
Fittings	250	
Other expenses . . .	250	
Stables		£2,500."

On the 28th of the same month *White* applied to the Plaintiff, who had before executed works under his superintendence, to ascertain if he would undertake such a contract; and after some correspondence, the Plaintiff attended at *White's* office for three days, on the 26th, 27th, and 28th of March, 1867, when he was informed generally of what the projected works would consist. The Plaintiff alleged that no specifications or working drawings were at that time prepared, and there were no materials in existence from which a contractor could take out the quantities; that the Defendant *White* shewed him the sketch drawings of the house and offices, and called out the quantities of the work to which such drawings related, and the Plaintiff thereupon stated the prices for such quantities, but that as to the laundry, stabling, and fittings there were no drawings; that the aggregate price of the house

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thus arrived at amounted, without fittings, to £9500, and that the following gross sums were set down by *White*, namely, £640 for the laundry and courtyard; £1620 for the furnishing and fittings; and £1800 for the stables—making a total of £13,500.

The Defendant *White* stated that on the occasion referred to he produced plans and paper sufficient to enable the Plaintiff to take out the quantities of work with sufficient accuracy, with the assistance and explanations which the said Defendant offered to give him.

On the 28th of March *Dick* received the following letter from *White*:—

"March 27th, 1867.

"Dear Mr. *Dick*,—You will be glad to hear that I have gone satisfactorily over the work with Mr. *Kimberley*, and he is ready to sign a short preliminary contract to-morrow if you approve—

"Shell of house, including laundry, &c. .	£10,140
Finishings and fittings	1,620
Stables	1,800
Then there will be clerk of works and expenses	380
Contractor's estimate	140
Architect and expenses	780
	£14,860

"So that you may safely rely upon the £15,000 covering everything, unless you want more done than I have proposed. Indeed, I can now promise it shall not exceed that sum.

"Yours faithfully,

"*Wm. White.*"

The following tender was prepared by the Defendant *White*, and signed by the Plaintiff, relying, as he alleged, on the representations made to him:—

"To *W. W. F. Dick*, Esq., M.P. "March 29, 1867.

"I hereby undertake to erect and complete the proposed house and offices, furnished and fitted complete with stabling and fittings, at *Humewood*, in the county of *Wicklow, Ireland*, in accordance with the plans and particulars prepared for the same, and fully explained to me verbally by *William White*, F.S.A., architect, for

the sum of £13,690, as enumerated below. And I hereby agree and undertake to enter into a proper contract for the same, in accordance with the general form submitted to me which accompanies this tender, so soon as the working plans and specifications shall be ready for the same. And I will engage to submit to the sole adjudication of the said architect all questions relating to the same, completing the whole of the works to his entire satisfaction by the end of June, 1869, but having the back wings and offices ready for your occupation by the end of June in the year 1868, and the remainder of the house by the end of September in the same year, with the exception of decorative finishings:—

House and offices without fittings, but including laundry and courtyard	£10,200
Finishings and fittings	1,690
	11,890
Stables and fittings complete . . .	1,800
Total	£13,690

"All the materials to be the best of their respective kind; the woodwork to be well-seasoned; the joinery to be cut out; and the whole of the timbers delivered on the spot immediately on the signing of the contract. (Signed) "*A. Kimberley.*"

This tender was sent to *Dick*.

With regard to this tender the Plaintiff stated that the plans and particulars therein referred to were pencil sketch drawings of the house and offices only, and the quantities and gross sums noted down by *White* at their meeting at *White's* office, and that the Plaintiff signed the tender on the express understanding and condition that such quantities and gross sums respectively should not be exceeded in the detailed working plans and specifications.

The Defendant *White* made the following statement respecting this part of the case:—

"On the morning of the 28th or 29th the further question arose in conversation as to what must be done in case the working plans and specification, which I expressly stated should form the sole basis of the contract, should be found so far unduly to exceed the original quantities as to create difficulties in the Plaintiff's signing

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the formal contract. This was agreed by us to be very unlikely, and the Plaintiff expressed himself satisfied that a liberal spirit had been shewn in the estimate, and that he should not be over-nice about small matters. The Plaintiff well knew that I never had been, and never would be, responsible either on my own behalf or on behalf of my clients for the correctness of the quantities; and that I never had received, and never would receive, any consideration for assisting a builder in taking out quantities; but I gave him to understand that, if he should not see his way in accepting the contract finally at the moment agreed upon, I should be willing to revise the said plans and specification in detail; or that I would endeavour to get Mr. *Dick's* consent to increase the amount, and at the worst (which was most unlikely), that I must procure that payment should be made to him by Mr. *Dick* for such work as he might have already executed prior to the refusal to sign the contract, with liberty to myself, on Mr. *Dick's* behalf, to enter upon negotiations with other builders."

It was then agreed that the works should be proceeded with. They were commenced at the beginning of April, and in the meantime *White* submitted to *Dick* his plans and specifications.

On the 3rd of June, 1867, the Plaintiff was requested to come up to town to sign the contract in the course of a few days. He was ill, and unable to come up by the time specified; and *White's* principal clerk was accordingly sent down to him with the contract and the plans, which, after a short interview, the Plaintiff signed; but he alleged that he had not sufficient time or opportunity, owing to the state of his health, properly to examine them. There was much conflicting evidence on this subject.

The contract was dated the 12th of June, 1867, and was made between the Plaintiff as contractor, on the one part, and the Defendant *Dick*, on the other part; and thereby, after reciting that the Plaintiff had, on the 29th of March, 1867, signed the undertaking to enter into a contract, and that the present contract was the general form in the undertaking referred to as accompanying the tender, and that the specification thereto annexed and the working plans had been since submitted to, and approved by, him, and were to form part of the contract, the Plaintiff thereby agreed to complete the works to the satisfaction of the architect for the

sum of £13,690; and it was thereby provided as follows: "The said architect is held and considered to have the power of ordering any alterations or omissions during the progress of the works, without in any way vitiating this contract, and such alterations shall be thereupon carried out by the said contractor; and further, that in case any difference of cost be caused by such alterations, a formal order for the same, signed by the architect, shall be sent to the contractor, whose proceedings to carry out such works shall be considered as a due acceptance of the same," and further: "The contractor agrees that no actual or pretended excess, whether in construction, materials, or matter of detail shewn by the subsequent working drawings, shall in anywise be considered as a claim for extra charges except as herein provided; and further, that he will do no extra work, nor in anywise claim or demand payment for the same, if done, but on these conditions."

The contract also contained the following proviso:—

"And it is hereby further agreed that all questions between the said parties touching the matters relating to this contract, shall be left to the sole determination or award of the said architect; and the said parties hereto respectively shall and will abide by, and perform and keep, the said determination or award made in writing under his hand and seal delivered to the said parties respectively, direct. And it is hereby further agreed by and between the said parties that the submission hereby made shall, at the option and at the expense of either of the parties requiring the same, be made a rule of Her Majesty's Court of Queen's Bench at *Westminster*."

The working plans referred to in the contract were thirteen in number, and there were seventy-seven pages of specifications, all of which the plaintiff marked with his initials, but he stated that it would have taken at least a month's diligent labour of a skilled contractor to take out the quantities from them. The Plaintiff had no copy of the contract left with him.

The Plaintiff proceeded with the building and with various extra works under the direction of the architect, believing, as he alleged, that for all such extra works he would be paid. The cost of the works, including such extra works, considerably exceeded the

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amount mentioned in the estimate and contract; and this, according to the Plaintiff, was partly owing to the fact that the quantities in the detailed working drawings prepared by *White*, and appended to the contract, considerably exceeded those given to the Plaintiff as the basis of his estimate. The Defendant *White* refused to certify for the payment of such extra works.

At the beginning of the year 1869, the Plaintiff for the first time discovered that the Defendant *White* had given a promise or guarantee to the Defendant *Dick* that the whole cost of the works comprised in the contract should not exceed £15,000, including the architect's remuneration and the salary of the clerk of the works. The Plaintiff alleged that *White* had thereby a personal interest in keeping down and reducing the amount justly payable to the Plaintiff, and that it was inequitable that any of the matters in question should be left to his adjudication.

The Defendant *Dick* refused to pay the amount claimed by the Plaintiff for extra works, and the Plaintiff accordingly filed his bill against the two Defendants, praying that it might be declared that, in addition to the said contract price of £13,690, he was entitled to be paid by measure and value for all quantities of work executed by him beyond the quantities included in the Plaintiff's estimate of the 29th of March, 1867; that an account might be taken of what, on the footing of such declaration, was due to the Plaintiff from the Defendant *Dick* in respect of the works included in the estimate, and the extra works executed by the Plaintiff; and that the Defendant *Dick* might be ordered to pay what should be found due.

The Defendant *Dick* declined to enter into the question between the Plaintiff and *White*, and relied entirely on the Plaintiff's tender and contract; and stated that he was ready and willing to pay whatever might be due to him under the contract as soon as he obtained the requisite certificates of the amount. He denied that *White*, while acting as his architect, was his agent. He admitted that the basis of his employment of *White* was, that the sum of £15,000 was to cover every expenditure, as stated in the letter of the 27th of March, 1867, and submitted that the bill ought to be dismissed with costs.

The Defendant *White's* grounds of defence have already been

partly stated. He, by his answer, went fully into all the transactions, for the purpose of shewing that he had treated the Plaintiff with good faith; that the Plaintiff had full opportunity of preparing his estimate; that the price mentioned in the contract ought not to stand for the quantities and works stated as the basis for the Plaintiff's estimate; and that the Plaintiff ought not to be paid by measure and value for the excess in the quantities and works executed by him; but that the contract was binding on the Plaintiff, and ought to be strictly adhered to, and that it was not now open to the Plaintiff to raise any question as to alleged discrepancies between the quantities in his estimate and those in the contract plans and specifications. He further stated that he had not given any personal guarantee to *Dick* that the total cost should not exceed £15,000, and that he had not thereby any personal interest in keeping down that cost.

Mr. *Southgate*, Q.C., and Mr. *Begg*, for the Plaintiff:—

The Plaintiff in this case is entitled to an account of all extra works done and executed by him in pursuance of the tender. The tender and the contract must be taken together, and as the contract was executed by the Plaintiff without sufficient materials being furnished to him by the Defendant *White*, and when he could not give the time which was necessary to enable him sufficiently to consider it, he cannot be strictly bound by it wherein it differs from the tender. Besides, the evidence shews that the real contract between the parties differed materially from the written contract; and parol evidence may be adduced to shew what the actual contract is. The Defendant *White* must throughout these transactions be regarded as the agent of *Dick*, and *Dick* must be held responsible for his acts.

It appears that *Dick* had been assured by *White* that the whole expense should not exceed the sum of £15,000. This promise or undertaking was never disclosed to the Plaintiff; and on this ground we contend that the arbitration clause in the contract providing that "all questions between the parties touching the matters relating to the contract shall be left to the sole determination or award of the architect," cannot be enforced; for it has been held that where there is any circumstance calculated to bias

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the mind of an arbitrator unknown to either of the parties who have submitted to his decision, that is a sufficient ground for the interference of the Court.

Thus, in *Kemp* v. *Rose* (1), where a builder, by his contract, bound himself to abide by the decision and certificates of an architect as to the amounts to be paid for the work, not knowing that the architect had given an assurance to the employer that the cost of the building should not exceed a certain sum, although he refused to guarantee that amount, the Court did not consider the decision of the architect made under such a bias as binding, but gave directions so as to ascertain, under the authority of the Court, how much remained justly due to the Plaintiff. That case is a direct authority in the Plaintiff's favour.

The same principle was recognised in *Scott* v. *Corporation of Liverpool* (2), where, however, as the builder was aware of the agreement between the architect and his employer, and of the fact of the architect's interest in consequence, the builder's case failed. In *Pawley* v. *Turnbull* (3) the Court, on being satisfied that there had been unfair conduct towards a builder, on the part of an architect whose decision was by the terms of the contract to be final, decided that the builder must be relieved from all penalties by reason of the non-completion of the contract, and declared the architect's decision not binding.

On these authorities we contend that the arbitration clause in the contract here must be set aside. That being so, the question arises whether the Plaintiff is to be left to his remedy at law. We submit that this Court has full jurisdiction to deal with it. Where, as here, the account is a very complicated one, and can be more conveniently taken in a Court of Equity, then such an account will be ordered to be taken, as in *McIntosh* v. *Great Western Railway Company* (4) and *Taff Vale Railway Company* v. *Nixon* (5).

Mr. *Jessel*, Q.C., for the Defendant *Dick* :—

Where fraud is charged by a bill which the Plaintiff fails to establish, then he cannot succeed unless he has some other equity

(1) 1 Giff. 258. (3) 3 Giff. 70.
(2) 1 De G. & J. 369. (4) 3 Sm. & Giff. 146.
(5) 1 H. L. C. 111.

distinct from that based on the allegations in the bill. The case of *Kemp* v. *Rose* (1), relied on by the other side, is not law. It is inconsistent with the decision of the House of Lords in *Ranger* v. *Great Western Railway Company* (2), where a contract was entered into between a railway company and a contractor, and in case of dispute between the contractor and the chief engineer before the completion of the works it was agreed that the decision of the engineer should be final, and the contractor subsequently discovered that the engineer was a large shareholder in the company. Disputes having arisen he filed his bill to have the accounts taken, but the House of Lords held that the ground above stated formed no ground of relief. So in *Hill* v. *South Staffordshire Railway Company* (3), where payments to a contractor were to be certified by the engineer of the railway company, he was held not to be disqualified from so doing, on the ground of his having become lessee of the company at a rent depending on the amount so certified for.

In *Bliss* v. *Smith* (4) *Kemp* v. *Rose* was cited, but disregarded by the Court.

In *Scrivener* v. *Pask* (5), where an owner employed an architect to prepare plans and a specification for a house, and to procure a builder to erect it for him, the architect took out the quantities, and represented to the builder that they were correct, and the builder thereupon made a tender which was accepted. The quantities proved to be incorrect, and the Plaintiff expended upon the building a much larger amount of materials than he contemplated. It was there held that there was no evidence that the architect acted as the agent of the owner in taking out the quantities, or that the owner guaranteed their accuracy; and that therefore the builder could not recover more than his contract price.

The same principle is applicable here, and *Dick* cannot be held to have guaranteed the correctness of *White's* quantities.

Mr. *W. Pearson*, on the same side:—

By the terms of the contract the Plaintiff could not be allowed

(1) 1 Giff. 258.
(2) 5 H. L. C. 72.
(3) 11 Jur. (N.S.) 192.
(4) 34 Beav. 508.
(5) 18 C. B. (N.S.) 785; Law Rep. 1 C. P. 715.

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for extra works, except where authorized by the architect. By the case of *Scott* v. *Corporation of Liverpool* (1), it appears that such a contract is as much binding in equity as at law. The Plaintiff claims under the contract, by which he virtually adopts it, and he also claims to set aside the contract. He contends that the quantities were not fairly represented to him by *White*, and that he signed the contract on the footing of such representations, which were, he says, adopted by *Dick*. But, even if he was so misled, that would not affect *White*, unless he were *Dick's* agent, which cannot be established.

As regards an architect's authority to bind his employer, he cannot bind him for extra works, except under the contract, and then only by orders in writing: *Rex* v. *Peto* (2); *Cooper* v. *Langdon* (3). It is settled law that an architect is only the agent of an owner for the purpose of seeing that the plans are adhered to, and that if a builder, on the authority of an architect, makes alterations, his only remedy is against the architect. He cannot recover for anything beyond the contract, except by special authority from the owner.

In *Coker* v. *Young* (4), which was a case on a building contract, providing that extra works were to be allowed for at amounts to be named by the surveyor, it was held that the contractor could not claim for work as in excess of the quantities on which it was based, nor for any additions beyond the amount allowed by the company.

The Plaintiff's remedy, if any, is at law; and there is no equitable construction of such a contract distinct from that which is legal. This appears from the case of *Scott* v. *Corporation of Liverpool.*

The bill is framed on the ground of equitable fraud; but even if that were established, the contract would not be void, but voidable where redress could be obtained at law.

Lastly, if the Plaintiff seeks to set aside the contract he cannot do so in the present suit without filing a bill to have the contract rectified.

(1) 1 De G. & J. 369. (3) 9 M. & W. 60.
(2) 1 Y. & J. 37. (4) 2 F. & F. 98.

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Sir *R. Baggallay*, Q.C., and Mr. *Cozens-Hardy*, for the Defendant *White*:—

The Defendant *White* is not a necessary party to this suit, and, as against him, the bill should be dismissed with costs. It is true that there are allegations in the bill impeaching the propriety of *White's* conduct, but no relief is prayed against him. There is no case of collusion between *Dick* and *White*, and no allegation against him subsequent to the execution of the contract. If there has been a mistake common to both parties to a contract, then the Court will rectify a contract; but if the mistake is only on one side, then the Plaintiff must shew not only that he was misinformed, but that the mistake was known to *White*, and that he was acting as agent for *Dick*.

Mr. *Southgate*, in reply:—

The case of *Kemp* v. *Rose* (1) has not been overruled. In *Ranger* v. *Great Western Railway Company* (2) the contractor might have known that the engineer was a shareholder. In *Hill* v. *South Staffordshire Railway Company* (3) the suit was not decided.

In this case the architect gave the Plaintiff the quantities, not the drawings from which the quantities were to be taken out, and he was led to believe that the plans would not exceed them. This has proved not to be the case, and hence a case of equitable fraud arises on the part of the agent for which the principal is liable: *Barwick* v. *English Joint Stock Bank* (4).

It is said that we ought to have filed a bill for the rectification of the contract, but that is only necessary where no occasion has arisen for acting under the contract, not where the whole question as to the rights of the parties is in dispute.

There are numerous cases where the Court has admitted evidence to shew what was the real contract between the parties. Thus, in *Harris* v. *Rickett* (5), in the case of a bill of sale, evidence of an original verbal agreement was admitted where a subsequent written agreement did not contain the whole of the agreement between

(1) 1 Giff. 258.
(2) 5 H. L. C. 72.
(3) 11 Jur. (N.S.) 192.
(4) Law Rep. 2 Ex. 259.
(5) 4 H. & N. 1.

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the parties. So, in *Rogers* v. *Hadley* (1), parol evidence was held to be admissible as to certain bought and sold notes, to shew that there was no real contract between the parties. In *Lindley* v. *Lacey* (2) evidence of a prior oral agreement was held to be admissible, notwithstanding a subsequent agreement in writing.

In *Malpas* v. *London and South Western Railway Company* (3) parol evidence was admitted to shew that a railway company had verbally agreed to carry cattle to a particular station, when a subsequent consignment note only specified an intermediate station on the line.

In *Morgan* v. *Griffith* (4) evidence was admitted of a parol agreement collateral to a written lease; and in *Bold* v. *Hutchinson* (5) a settlement was rectified and made conformable to marriage articles on evidence of representations made at the time by the lady's father.

Nov. 3. LORD ROMILLY, M.R.:—

This suit is instituted by a builder residing at *Banbury*, in *Oxfordshire*, against Mr. *Dick*, the Member of Parliament for the county of *Wicklow*, in *Ireland*, and Mr. *White*, an architect residing in *London*.

In the beginning of 1867 Mr. *Dick* employed Mr. *White* as his architect to build a mansion for him at *Humewood*, in the county of *Wicklow*, and Mr. *White* employed the Plaintiff to execute the necessary works.

The Plaintiff insists that, besides the contract price, he is entitled to be paid for extra works which are not included in the contract. In terms this would not be contested, but the parties differ as to what works are or are not so included. The Plaintiff disputes the meaning and effect of the contract which, as he contends, entitles him to be paid by measure and value for all quantities of work executed by him in excess of the quantities included in his estimate, upon which, and having exclusive relation to which, he maintains the contract was founded and ought to be construed.

(1) 2 H. & C. 227.
(2) 17 C. B. (N. S.) 578.
(3) Law Rep. 1 C. P. 336.
(4) Ibid. 6 Ex. 70.
(5) 5 D. M. & G. 558.

Mr. *White* takes issue on these facts; he denies any liability except under the contract, and asserts that all is provided for by the contract, which is to be construed strictly. Mr. *Dick* says that this is a matter in which he has no concern, and that the Plaintiff and Mr. *White* must fight it out between them; for that he entered into a contract with Mr. *White* to build, or cause to be built, the house in question for £15,000, including everything, and that he has paid, or has always been and is now ready and willing to pay, every part of such £15,000 on receiving the certificates of Mr. *White* stating the propriety of paying them, and certifying that the work has been done.

It is necessary, for the purpose of disposing of this case, to ascertain, in the first instance, how far Mr. *White* was the agent of Mr. *Dick*, and also how far Mr. *White* acted, and how far he assumed to act, as such agent; and in order to enable the Court to do so, it is necessary carefully to examine the facts which are established in this case.

[His Lordship then stated the facts of the case previous to the signing of the tender, and with reference to the interview between the Plaintiff and the Defendant *White* on the 26th, 27th, and 28th of March, 1867, observed:—]

The accounts given by the Plaintiff and the Defendant of what then occurred are very different. It is, however, admitted that no working drawings were produced, nor was any full specification of the works intended to be made; but the Defendant insists that what was produced was quite sufficient to enable the Plaintiff to come to a just estimate, and one sufficient to enable him to make a proper tender. The drawings and other documents are themselves given in evidence, and are produced to me, and I have carefully examined them. To me they appear to be extremely rough and undefined, so much so as, without much concomitant explanation, to convey no accurate idea of what was required or intended to be done—certainly not to an unprofessional mind; and, judging from the evidence, I should conclude that nearly the same result would occur to a professional mind. It must, however, always be remembered that in technical and professional matters of this description with which the Court is not familiar, and where it is only assisted by such explanations as counsel can afford—such

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assistance being for the most part received from their clients as the occasion arises—much that seems obscure to the Court might be clear and distinct to a professional eye.

[His Lordship, after reading the tender of the 29th of March, continued:—]

It is, having regard to what subsequently occurred, proper to observe that this document states that the explanations of Mr. *White*, on which the estimate was founded, and which were most essential for enabling anyone to form a just estimate, were given verbally; but at the same time Mr. *White* informed the Plaintiff that he would not be responsible, either on his own behalf or on behalf of his client, for the correctness of the quantities; but at the same time gave him to understand that if the Plaintiff should not see his way to accepting the contract finally at the amount agreed upon, he, Mr. *White*, would be willing to revise the plans and specification, or that he would endeavour to get Mr. *Dick* to increase the amount, or that he would procure payment to be made to him for such work as he might have executed prior to his refusal to sign the contract.

And in the estimate on which the tender is founded it is proper also to notice that the only subject-matter of which the quantities were taken out on those three days was the house, and that without any fittings. The laundry and courtyard were lumped in at £640, the finishings and fittings were in like manner set down in a lump sum at £1640, and the stables and fittings complete were similarly estimated without any details at £1800.

In respect, therefore, of any part of the works, with the exception of the bare house itself, the Plaintiff, in making the tender, relied on the estimate Mr. *White* thought proper to suggest.

The matter was so far considered as settled that though no formal contract was then executed it was mutually understood between them that the Plaintiff was to begin the works at once, subject to Mr. *White* and himself being able afterwards to come to a binding and definite arrangement.

Accordingly, within a week from this time, the Plaintiff commenced the works, which were continued, though without any proper working drawings, till June following, when the contract in

question was signed. The circumstances connected with this signature of the contract are as follows:

[His Lordship then shortly stated the circumstances under which the contract was signed.]

There is much discussion and conflicting evidence given respecting the signature of the contract, and what then occurred, and which, though I think it necessary to refer to it, does not, in my opinion, very materially affect the principal question which arises in this suit.

The Plaintiff had unquestionably not time, according to any statement of the time which elapsed, to go through the contract and specification with any pretence to accuracy; but on the other hand, this is certain, that no false representations were made to him at the time, and if he did the whole thing in a hurry he must take the consequences of his haste, however much that haste might have been occasioned by a desire on his part to promote the convenience of Mr. *Dick*, and to enable his agent to return to *Dublin* on that day. If the Plaintiff thought fit to enter into a contract in such a state of circumstances, and under such conditions, it is his affair, and he must take the consequences. For it is always to be borne in mind that this is not a suit to set aside the contract, nor is it a suit to resist the specific performance of the contract; but it is a suit to take the accounts of what is fairly due to the Plaintiff under the contract then signed, having regard to all its modifications—taking into consideration the works already executed by the Plaintiff under the directions of the Defendant Mr. *Dick*, through his agent, Mr. *White*, and also taking into consideration to what extent, if any, this contract is to be construed with, or to be affected by, the previous estimate of the Plaintiff in March.

I therefore proceed now to examine the contract itself, and shall then consider what works were then, and have been since, executed by the Plaintiff under the directions of the Defendant *White*. This raises the question of the character in which Mr. *White* is to be considered in dealing with this case. And in doing so I am of opinion that I must treat Mr. *White* as the agent of Mr. *Dick*, generally, for all purposes connected with this building, and that without any limitation as to price or anything else. After careful examination, I can find no evidence to satisfy me that the Plaintiff was informed

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that Mr. *White's* authority as agent was, by any contract between him and his employer, Mr. *Dick,* distinct or otherwise, limited to the expenditure of £15,000 and no more.

I am of opinion that, however Mr. *White* might exceed that amount, the Plaintiff had not any notice that as between him and Mr. *Dick* such excess would not have been recoverable from Mr. *Dick* by the Plaintiff, or that, whatever may have been the advantage derived by Mr. *Dick* from the original or extra works, the amount that the Plaintiff could recover was to be limited to £15,000. It may be that, as between Mr. *Dick* and Mr. *White,* Mr. *White* might not have been able to charge him with more than £15,000, and that Mr. *White* may have bound himself that no person employed by him should make any such charge against Mr. *Dick;* but unless distinct notice of such contract was given to that third person so as to bind him, and assuming, as I do, that the agency between Mr. *Dick* and Mr. *White* is established, then I am of opinion that the third person so employed is entitled to be paid what is really due to him from Mr. *Dick,* whatever, as regards Mr. *Dick* and Mr. *White,* may be the rights between them. These rights, if they should arise here, being a matter between co-defendants, I should be unable to deal with in this suit—at least in this stage of the suit.

According to the evidence before me, it was not till the 1st of January, 1869, that the Plaintiff became aware of the fact that a contract existed between the Defendants that the total expense of the building, and of all fittings and accessories, was not to exceed £15,000.

I come now to examine the contract signed by the Plaintiff on the 12th of June, 1867. [His Lordship then stated the purport of the contract and the arbitration clause, and continued :—] It is proper, and, in the present case, it is very material, to observe that this clause does not, in my opinion, give Mr. *White* the power of acting as judge in matters of difference which may arise between himself and the Plaintiff, however much the Defendant Mr. *Dick* may be interested in the same; but that this clause must be construed to mean the matters of difference between the Plaintiff and the Defendant Mr. *Dick,* or between the Plaintiff and some person connected with the works, which matter in difference

cannot in any respect affect the interest of the Defendant Mr. *White*.

The materiality of this observation does not become sufficiently obvious without some further explanation. In an ordinary case, where no contract exists between the architect and the employer to the effect that the outlay shall not exceed a given sum, no difficulty occurs : thus if a question arises as to the value of certain extra works executed by the builder, or a question arises as to whether certain works are or are not included in the contract, each of these is a question solely between the employer and the builder, and the builder has agreed and bound himself to abide by the decision of the architect on all such questions; and accordingly he must abide the result and obey the decision of the architect, whatever it may be. But if, besides the contract between the employer and the builder, there is a contract between the employer and the architect that the outlay shall not exceed a given sum, and the builder is by the contract subject to the orders of the architect as to what works he shall execute, then, if such points as those above suggested arise, the question becomes one between the architect and the builder; for, by the second contract, in no case can the employer be called upon to pay to the builder more than the sum agreed upon as the total outlay, without his being also entitled to deduct it from what he has to pay to the architect, or, if already paid, to recover it back from him. And then it is impossible that the builder can be bound by an undertaking that he would abide by the decision of the architect on all such questions, inasmuch as that undertaking has been entered into by the builder at a time when he was ignorant of the contract between the architect and the employer, and when he supposed that the decision of the architect would be impartial, unbiassed, and not one in which he had himself a strong pecuniary interest.

I am of opinion, therefore, that the contract or engagement between Mr. *Dick* and Mr. *White* that the total outlay should not exceed £15,000 having been concealed from the Plaintiff, it completely annuls this proviso for referring all matters to the arbitration of the architect, so far as the Plaintiff is concerned. In order to make it binding it was essential that, before the Plaintiff entered into the contract with Mr. *Dick*, submitting to the arbitration of

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Mr. *White*, he (the Plaintiff) should have been informed of the contract subsisting between Mr. *White* and Mr. *Dick*, and of the strong interest Mr. *White* must necessarily have to decide against the Plaintiff all questions of value, and all questions of extra work, which could result in money to be paid to the Plaintiff. Accordingly it was Mr. *Dick*'s duty to take care that this sub-contract was communicated to the Plaintiff as soon as possible, whether before or after the contract between the Plaintiff and Mr. *Dick*. Unless this contract between Mr. *Dick* and Mr. *White* was communicated to the Plaintiff and assented to by him, it has, in my opinion, the effect of erasing from the contract between the Plaintiff and Mr. *Dick* the whole of this proviso which relates to the arbitration of Mr. *White*.

Attached to this contract entered into by the Plaintiff were thirteen working plans and seventy-seven pages of specifications, every one of which the Plaintiff signed with his initials. It is admitted by the Defendant Mr. *White* that if the matter had been fully investigated it would have taken several weeks for the Plaintiff to have gone through them with accuracy; and there are various other proofs of the matter having been done in great haste.

But this Court is not called upon to annul the contract, it can only construe it; and Mr. *Kimberley* himself must bear the consequences of entering into a contract without sufficient consideration and reflection, when, as in this case, his signature was not obtained by any undue means.

With respect to the quantities given in March, 1867, on which the Plaintiff founded his estimate, it seems to me to be proved that in the working plans considerably larger quantities are given; and I am also of opinion that the Plaintiff, when he signed the contract, had not sufficient time afforded him to take out and to compare the quantities of each, and that probably a very considerable variation would have been made in the contract, as signed by the Plaintiff, had he perceived this; but then the Plaintiff should have stopped as soon as he discovered this, and he should not have gone on with the works under the contract in the expectation of something different from the contract being allowed to him; but he should either have required the alteration to be then made, or he should have repudiated the contract altogether. It therefore is only open to the Plaintiff to insist on an inquiry into, and payment

for, what is not included in the works mentioned in the contract, and also for such variations as are provided for by the contract, and to be paid for these distinctly from, and in excess of, the lump sum for which the works included in the contract were to be executed. That there are many such items is, as it appears to me, established by the evidence.

Besides this, it appears to me that in various other matters the Plaintiff is entitled to remuneration for which he has made claims which have not been allowed. It is too minute for me to go into the details, nor is it desirable that I should do so; but I feel—after an attentive perusal of the evidence and such examination as I am able to give to the plans, to the verbal promises made to the Plaintiff, and to the expectations held out to him by Mr. *White*—that I should be inflicting undue injury upon the Plaintiff if I were merely to dismiss his bill, and leave him to such remedy as he might have at law. At law, I am of opinion that the account would be too complicated to be taken in Court, that it would involve too many minute claims and counter-claims to be possible for it to be satisfactorily disposed of without a reference to arbitration, which, according to my experience, is usually one of the most dilatory and expensive of all tribunals. I am of opinion that the Court has jurisdiction to deal with this case, and that it is bound to do so.

I think, also, that there is evidence of an intention on the part of the Defendant Mr. *White* to bind the Plaintiff by his incautious adoption of a contract not in accordance with his tender, and to gain credit to himself for the cheap performance of a considerable architectural work of great merit, which circumstance might induce him to cut down the claim of the Plaintiff for extra work below what is equitable. Besides, the engagement entered into with Mr. *Dick* gives Mr. *White* a direct pecuniary interest to cut down all allowances to the Plaintiff. I repeat that in my opinion Mr. *White* must be treated as Mr. *Dick's* agent, and that any restriction of his authority by contract, between Mr. *Dick* and Mr. *White*, not communicated to the Plaintiff, cannot in any respect prejudice his rights; and in order to enable Mr. *Dick* to claim the benefit of the proviso that Mr. *White* was to arbitrate in all matters between him and the Plaintiff, it was essential that the fact of such contract between himself and Mr. *White* should have been communicated to

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the Plaintiff previously to his entering into any contract with Mr. *Dick* for the erection of the building, and the execution of the works in question containing such a proviso. It may unquestionably be true that this may hereafter raise a question which may have to be settled between the co-Defendants, but I cannot deal with that now.

The consequence of all this is, that I think I must direct an account to be taken of all extra works executed by the Plaintiff under the direction of the Defendant Mr. *White*, and also an account of what, if anything, is due to the Plaintiff in respect of the works executed by him under the contract, the price of which is not included in the contract, and of the variation of the works included in the contract, where such variation has been made by the direction of Mr. *White;* that an account must be taken of what is due to the Plaintiff in respect of the matters aforesaid, and also an account of what is due from the Plaintiff in respect of any omission on his part in the performance of the contract entered into by him; and what, upon taking such account, shall be found to be due to or from the Plaintiff and to the Defendant Mr. *Dick*, shall be paid accordingly.

MINUTES:—Inquire whether the Plaintiff has executed for the Defendant *W. W. F. Dick*, by or under the direction of the Defendant *W. White*, any and what works which are not included in the contract dated the 12th of June, 1867. Inquire whether the Plaintiff has executed for the Defendant *Dick*, under the said contract, any and what works, the price of which is not included in the said contract, or has made and executed by or under the direction of the Defendant *White* any and what variations in the works included in the said contract. Take an account of what, if anything, is due from the Defendant *Dick* to the Plaintiff in respect of the matters mentioned in the said inquiries respectively; also of what, if anything, is due from the Defendant *Dick* to the Plaintiff in respect of the contract price mentioned in the said contract of the 12th of June, 1867. Inquiry whether there have been any and what omissions on the part of the Plaintiff in the performance of the said contract of the 12th of June, 1867; and take an account of what, if anything, is due from the Plaintiff to the Defendant *Dick* in respect of such omissions. Adjourn further consideration. Liberty to apply.

Solicitors for the Plaintiff: Messrs. *Mackeson, Taylor, & Arnould*, agents for Messrs. *Kilby & Son, Banbury.*

Solicitors for the Defendants: Messrs. *Kinsey & Ade;* Messrs. *Waterhouse & Winterbotham.*

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[1869 A. 23.]

Settlement—Power of Sale and Reinvestment—Proceeds of Sale, whether Realty or Personalty.

By a marriage settlement lands were conveyed to trustees to the use of all the children equally, and his, her, and their heirs and assigns, with a power of sale, and a direction that the proceeds should be laid out in the purchase of other lands, or on government or real securities, which, when purchased, should be made liable to the same trusts, estates, and limitations as were declared of the trust premises. The lands were sold and the proceeds invested on mortgage:—

Held, that the proceeds of the sale must be treated as personalty and not as realty.

Earlom v. *Saunders* (1) distinguished.

BY a settlement on the marriage of *Joseph Atwell* and *Elizabeth Atwell*, dated the 17th of October, 1814, certain real estate was conveyed to trustees to the use of *Joseph Atwell* for life, then to the use of his intended wife for life, if she should survive him, and after the decease of the survivor, then to the use of the children of the marriage, as the husband or the wife, if she should survive, should by will or deed appoint; and in default of appointment, then "to the use of all and every the child and children of the said intended marriage in equal shares and proportions as tenants in common, and his, her, or their heirs and assigns respectively;" and in case there should be no child or children of the said intended marriage, or there being such, they should happen to die during the lifetime of the said *Joseph* and *Elizabeth Atwell* before any of them should attain the age of twenty-one years, then to the use of the said *Joseph Atwell*, his heirs and assigns. And it was thereby provided that it should be lawful for the said *J. Atwell*, with the consent of the trustees, to dispose of the said premises, provided that the purchase-money should be paid over to the trustees therein named, their heirs and assigns, to be laid out in the purchase of other lands and premises, or in government or real securities, which, when purchased, should be, and enure, and be made liable to the

(1) Amb. 240.

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same uses, trusts, estates, limitations, and provisoes as were therein appointed or declared of and concerning the same premises.

The power of appointment contained in the settlement was not exercised. In 1821 the hereditaments comprised in the settlement were sold in exercise of the power contained in the settlement, and the proceeds of the sale, amounting to £1002 19*s.* 0*d.*, was laid out by the trustees on mortgage security, together with other moneys placed in their hands by the said *Joseph Atwell.*

There were nine children of the marriage, two of whom died before the property was sold.

Joseph Atwell survived his wife, and died in 1870, leaving several of the children surviving.

The suit was instituted by the Plaintiff, who was one of the children of the marriage, to carry out the trusts of the said settlement; and the question arose, on further consideration, whether there had been any conversion of the real estate, or whether the said sum of £1002 19*s.* 0*d.* was still to be treated as real estate. The heir-at-law of *Joseph Atwell*, who was heir-at-law of his deceased children, claimed to be entitled to their shares, if the proceeds of the sale were to be treated as realty.

Mr. *Caldecott*, for the Plaintiff, submitted that the sum in question must be treated as personalty.

Mr. *Bagshawe*, for a Defendant, in the same interest:—

In this case there was no obligation that there should be a reinvestment in land. The limitation to the children, "their heirs and assigns," merely gives them an absolute interest in the property; and as the land has been converted into personal estate, it must retain that character.

[He referred to *Walter* v. *Maunde* (1) and *Shipperdson* v. *Tower* (2).]

Mr. *Begg*, for the heir-at-law of *Joseph Atwell* and of his deceased children:—

In this case there has been no conversion of the real estate comprised in the settlement. The words of the settlement clearly

(1) 19 Ves. 424. (2) 1 Y. & C. Ch. 441.

indicated that it was the settlor's intention that in the event of a sale the proceeds should still retain the character of realty, the direction to reinvest in government or real securities only referring to a temporary investment, while the purchase of land was the ultimate object.

In *Earlom* v. *Saunders* (1) a testator devised lands to his wife for life, with remainder to his first and other sons in tail male, with remainder to *W.* and *P.* in fee, as tenants in common, and directed £400 to be laid out in the purchase of land or on any other securities as they should think proper, and directed that the lands to be purchased, and the securities on which the £400 should be laid out, should be made to and settled on the trustees, their heirs and assigns, to the same uses as the lands before devised. The intermediate limitations failed; *P.* died, and afterwards *W.*, under age. The £400 not having been laid out in land, the question was whether it was now to be considered as realty or as personalty; and Lord *Hardwicke* held that the money was to be laid out on land and on securities till the land was purchased.

That was followed in *Cookson* v. *Reay* (2), where a sum of money, directed by will to be invested "in land or some other securities" for the benefit of one for life, with remainder to his children, but in failure of these to *A.* and his heirs, and which had not been invested in land, was held to have been originally impressed with the character of real estate, though by the subsequent dealing therewith by the parties interested in it, it had acquired the character of personalty.

Besides, under this settlement the word "heirs" is rather a word of purchase than of limitation.

LORD ROMILLY, M.R.:—

I do not think the words in the power of sale in this settlement have the effect of giving to the proceeds of the sale of the estate the character of realty. It is to be observed that there was no compulsion on the part of the trustees to reinvest in the purchase of land. In the case of *Earlom* v. *Saunders*, Lord *Hardwicke* considered that the original uses could not be

(1) Amb. 240. (2) 5 Beav. 22.

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carried out unless the character of realty was retained. Here the word "heirs" is one of limitation, not of purchase. The trustees have altered the character of the property and converted it into personalty; and I am of opinion that it must be so treated.

Solicitor: W. B. *Brook.*

M. R. 1871 Nov. 24.

In re CROWE'S MORTGAGE.

Trustee Extension Act, 1852, s. 2—*Mortgage—Covenant to surrender Copyholds—Petition by Mortgagee for Vesting Order—Service on Mortgagor.*

Where a mortgagor, who has covenanted to surrender copyholds to his mortgagee, ~~and has~~ neglected to make such surrender within twenty-eight days after demand and tender of engrossment by the mortgagee, the Court will, on the petition of the mortgagee, make a vesting order under sect. 2 of the *Trustee Extension Act*, 1852, without requiring service of the petition on the mortgagor.

THIS was a Petition under the *Trustee Extension Act*, 1852, to obtain a vesting order, vesting in the Petitioner certain copyhold lands comprised in a mortgage of the 13th of March, 1869, and thereby, in consideration of £1200 advanced by the mortgagee, covenanted to be surrendered by *Robert Crowe*, the mortgagor.

The Petitioner, who was the transferee of the mortgage, had requested *Crowe* to surrender the copyholds, and caused a memorandum of surrender to be tendered to him for execution; but he had neglected to do so within the twenty-eight days required by sect. 2 of the Act, and still refused to make such surrender.

The Petition prayed that the said copyholds might vest in the Petitioner for all the estate of the mortgagor, subject to the equity of redemption therein.

It was intended to serve the Petition upon the mortgagor, but he could not be found.

Mr. *Cust*, for the Petitioner:—

The contract having been executed by the mortgagor's covenant to surrender, and by payment of the mortgage-money, the mortgagor has become a trustee for the mortgagee; and the Court can

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make a vesting order without a suit for specific performance: *In re Cuming* (1).

As to the service of the Petition on the mortgagor, I submit that it is unnecessary, as the mortgagor is in the position of a recusant trustee who has refused to convey the trust estate within the time mentioned in sect. 2 of the *Trustee Extension Act: In re Baxter's Will* (2).

LORD ROMILLY, M.R., held that the order might be made, and service on the mortgagor dispensed with.

Solicitors: Messrs. *Newman & Lyon.*

In re CONTRACT CORPORATION.

M. R.
1871
Nov. 18.

Practice—Company—Winding-up—Special Examiner.

A person summoned under the *Companies Act*, 1862, *s.* 115, to give information respecting the affairs of a company which is being wound up by the Court, is not entitled to any voice in the appointment of a special examiner.

THE official liquidator of the *Contract Corporation, Limited* (now in course of being wound up by the Court), having reason to believe that Mr. *Adolphe Hakim* was capable of giving information respecting the affairs of the company, took out a summons under sect. 115 of the *Companies Act*, 1862, requiring him to attend at the Chambers of the Master of the Rolls and be examined. Mr. *Hakim* attended accordingly, and thereupon the solicitors of the liquidator proposed that the examination should be adjourned before a special examiner, who had been appointed to take the examination and cross-examination of witnesses in the winding-up. Mr. *Hakim*, while admitting that he had no objection to the examiner, refused to go before him, on the ground that he was entitled to be heard with reference to his appointment.

The matter was adjourned into Court, and now came on to be heard.

(1) Law Rep. 5 Ch. 72. (2) 2 Sm. & Giff. App. v.

M. R. 1871 — *In re* CONTRACT CORPORATION.

Sir *R. Baggallay*, Q.C. (Mr. *Chitty* with him), for the liquidator:—

Mr. *Hakim* will probably rely on the decision in the case of *In re Smith, Knight, & Co.* (1); but there proceedings were pending between the liquidator and the person summoned to be examined; here there are none pending, and Mr. *Hakim* is a mere witness, and is not entitled to any voice in the appointment of an examiner.

The Solicitor-General (Mr. *Jessel*), (Mr. *Marten* with him), for *Hakim*, submitted that the rule laid down in the case referred to applied; for the summons was obviously taken out with the view of obtaining information on which proceedings against Mr. *Hakim* might be founded.

LORD ROMILLY, M.R., said that he would not, in any case, allow a mere captious objection to an examiner to prevail; here Mr. *Hakim* was merely a witness, and was not entitled to be heard on the subject. He must therefore go before the examiner.

Solicitors: Messrs. *Linklater & Co.*; Messrs. *Thomas & Hollams.*

M. R. 1871 — *Nov.* 18, 25.

MORGAN *v.* BRITTEN.

Will—Construction—Gift to "all and every the child and children"—Joint Tenancy or Tenancy in Common.

7 Ch. 344

A gift in trust for "all and every the child and children" of *A.* and his, her, and their executors, administrators, and assigns, for his, her, and their own absolute use and benefit:—

Held, to create a joint tenancy.

THIS was a Petition for payment out of Court of a fund which had been carried to a separate account in the suit.

The fund was bequeathed by the will of *John Downes*, dated the 25th of July, 1825, to trustees upon trust for his daughter during her life, and after her death in trust for "all and every her child

(1) Law Rep. 8 Eq. 23.

and children, and his, her, and their executors, administrators, and assigns, for his, her, and their own absolute use and benefit."

Upon the death of the tenant for life, this Petition was presented by the surviving children, who claimed as joint tenants.

Mr. *A. T. Watson*, for the Petitioners, stated that he had been unable to find any authority precisely in point; and submitted that the gift created a joint tenancy.

Nov. 25. LORD ROMILLY, M.R., who had taken time to consider, said he was satisfied that it was a joint tenancy.

Solicitors: Messrs. *Wilde, Wilde, Berger, & Moore.*

V.-C. M.
1871
Nov. 11.

In re GREAT OCEANIC TELEGRAPH COMPANY.

HARWARD'S CASE.

Company—Contributory—Director bound to take Qualification—Agency of Allotment Committee.

7 Eq 223.
14 Eq 318.
8 Ch 557 (n)
9 Ch 104
18 Eq 431.
20 Eq 508
5 Ch D 313-6
7 Ch D. 135.
3 C P D 352
8 4 B D 693.
69 L J 99

H. allowed his name to be advertised as a director of a company, and was present at a board meeting at which an allotment committee was appointed. The committee allotted him fifty shares, which was the qualification for a director; but he never applied for shares or received a notice of allotment. He subsequently signed a cheque of the company as a director, but his signature was treated by the bank as insufficient, his name not having been sent in as authorized to sign cheques:—

Held, that by acting as a director he became liable to take the number of shares required as a qualification:

Held, also, that the allotment committee were his agents for the purpose of the allotment to him, and it was not necessary to give him notice of the allotment.

THIS was a summons adjourned into Court by the official liquidator of the *Great Oceanic Telegraph Company, Limited*, to put Mr. *Harward* on the list of contributories of the company for fifty shares.

The company was registered in September, 1869, with a capital of £600,000 in 60,000 shares of £10 each. Of the articles of association it is only necessary to refer to the following: Art. 4 provided that in case the whole number of shares should not be subscribed for or allotted, the registered holders of the shares should, nevertheless, be associated, and the regulations for the management of the company should be in force in like manner, as if the whole of such shares had been subscribed for. Art. 77 provided that, until a general meeting should otherwise direct, the number of directors should be such number as the board should from time to time appoint, so that the same should be not more than twenty or less than five; and the qualification of a director should be fifty shares, standing in his own name solely, and on which all calls should have been paid. Art. 108 provided that the board might commence the business of the company as soon as

they should think fit, notwithstanding that the whole of the capital might not then have been subscribed for.

Only 1003 shares were in fact applied for, on which 5*s.* per share was paid up.

Shortly before the company was registered a prospectus was issued and published and extensively advertised, and Mr. *Harward's* name appeared therein as a director. He was also present at the only meeting of the board of directors, which was held on the 19th of October, 1869. At that meeting a director was appointed, and a committee of directors formed to make allotments of shares.

The allotment committee met on the 3rd of November, 1869, and allotted a considerable number of shares, and amongst others, fifty shares to Mr. *Harward.* The only other act alleged to be done by Mr. *Harward* as a director was, that on the 18th of January, 1870, he signed a cheque for £50, drawn on the account of the company with the *National Provincial Bank of England,* which had already been signed by another director. Mr. *Harward's* name had, however, not been sent to the bank as one of the directors authorized to sign the cheques of the company, and the bank required the signature of another director before paying it.

The company was ordered to be wound up on the petition of a creditor to the amount of £1000.

Mr. *Harward* made two affidavits, in which he stated that he never applied for shares, and never received any notice of allotment; that he never saw the articles of association, and was not aware that the qualification of the directors was fifty shares. He also said that he never gave an unqualified assent to becoming a director, and he explained his being present at the board meeting of the 19th of October, 1869, by saying that the meeting was held at the offices and in the board room of the *Monarch Insurance Company,* of which he was a director, and that he had been present at a board meeting of the latter company held the same day, and remained in the room in order to hear what passed, and to satisfy himself as to the prospects of the *Oceanic Telegraph Company,* and that he took no part in the business which was transacted. He also stated that he had declined to sign an application for shares; and as to the cheque, that Mr. *Abraham Judah Leo,* in whose favour it was drawn, called at his office, and pressed him to sign

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it; that he refused to do so for a long time, but afterwards signed it, in consequence of his importunity, and to get rid of him.

Mr. *Glasse*, Q.C., and Mr. *Higgins*, for the official liquidator:—

There are two grounds for putting Mr. *Harward* on the list; first, he became a director and continued such, and was therefore liable to take a director's qualification: *A. Levita's Case* (1). It was his duty to see that an allotment was made to him. Secondly, as director, he nominated the committee to make allotments, and they properly made an allotment to him. He made them his agents for the purpose: *G. H. Levita's Case* (2). Having consented to be a director, he was bound by the allotment of the qualification: *Leeke's Case* (3).

[They also referred to *In re King's Cross Industrial Dwellings Company* (4).]

The VICE-CHANCELLOR:—I have already decided in *In re Disderi & Co.* (5), that a man, by becoming a director, binds himself to take the minimum qualification of a director.

Mr. *Cotton*, Q.C., and Mr. *Coode*, for Mr. *Harward*:—

In re Disderi & Co. differs from the present in the fact that there was an express agreement to take the shares. The mere fact of a man being a director does not make him liable to take a director's qualification: *Marquis of Abercorn's Case* (6), followed in *Tothill's Case* (7) and *Chapman's Case* (8). A director may repudiate the allotment of his qualification: *Austin's Case* (9). Here, having no notice of allotment, he could not repudiate, and therefore cannot be treated as being bound to take the shares. The actual performance of formal acts as director will not bind a man to take the qualification: *Eve's Case* (10). In *Leeke's Case* there was an agreement to take the shares; so also in *Currie's Case* (11). In *A. Levita's Case* there was an application for

(1) Law Rep. 3 Ch. 36.
(2) Ibid. 5 Ch. 489.
(3) Ibid. 6 Ch. 469.
(4) Ibid. 11 Eq. 149.
(5) Ibid. 242.
(6) 4 D. F. & J. 78.
(7) Law Rep. 1 Ch. 86.
(8) Ibid. 2 Eq. 567.
(9) Ibid. 435.
(10) 16 W. R. 1191.
(11) 3 D. J. & S. 367.

shares and acquiescence. *G. H. Levita's Case* (1) was a case of actual agency.

SIR R. MALINS, V.C., after stating the facts as to the formation and constitution of the company, continued :—

I am not prepared to say that the fact of Mr. *Harward's* name being held out to the public as a director would alone be sufficient to fix him with liability to take the shares. But it is not attempted to be denied that he was present at the board meeting. All that he says is, that he had been attending a meeting of the *Monarch Insurance Company*, and remained in the room, and so was present during the meeting in question, but that he took no part in the business which was transacted. But in my opinion a man as much undertakes the office of director by being present at a meeting as by acting in any other way. The company had a very difficult task before them. They attempted to commence business when only 1003 out of 60,000 shares had been applied for. Rational persons would have said it was their duty to have returned the deposit, and abandoned the formation of the company. But they appointed a committee to allot shares, and the committee met and allotted fifty shares to Mr. *Harward*.

Now my view of the recent authorities is, that they concur in holding that a man, by acting as a director of a company, incurs the obligation of taking the minimum number of shares required as a qualification. So that, apart from the question of allotment, I must hold Mr. *Harward* liable. But on the question of allotment, it is said that it was not completed, inasmuch as no letter of allotment was sent. It is true that the proceedings of the company were full of irregularity, but Mr. *Harward* cannot take advantage of that, for he was a party to them. This is, in fact, one of the cases of gentlemen who allow themselves to be named directors of companies, and cause expenses to be incurred, and then try to escape all liability. There is no case of repudiation set up. On the contrary, three months after the board meeting, Mr. *Leo* has a cheque of the company, to which he wants the signature of a second director. It is brought to Mr. *Harward*, and he signs it,

(1) Law Rep. 5 Ch. 489.

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as he says, only in consequence of Mr. *Leo's* importunity. But he cannot say that he did not sign as a director. It is said that the fact that the bank would not accept the signature as sufficient proves that he was not a director. But the reason, no doubt, was that other names had been sent in as authorized to sign cheques.

The facts, then, prove that Mr. *Harward* undertook the office of director and acted as such. I am sorry to find that there are cases which tend to shew that a man may do this and not incur any liability. But I am glad to find that the later cases are the other way. The older cases fall far short of establishing the proposition contended for by Mr. *Harward.*

In the *Marquis of Abercorn's Case* (1) he had not acted as a director at all: and the case is distinguished on that ground by the Lord Justice *Rolt* in *A. Levita's Case* (2). *Austin's Case* (3) was one of repudiation. *Austin* had done many acts shewing an intention to repudiate the office of director. He had accepted the office of director conditionally, and attended one board meeting, and signed a cheque for the company; but, on receiving a letter of allotment to qualify him, he at once returned it, declining at the same time to act as a director, not being satisfied as to the conditions he had stipulated for; and the secretary wrote back, stating that his resignation had been accepted. It is obvious that the case ran very near the line, and he only just escaped, and was with difficulty removed, and was allowed no costs. The Vice-Chancellor says (4): "I think it must be taken that the whole matter was not finally concluded, and his name must be struck off the list of contributories and removed from the register of members, but no costs will be given to him." *A. Levita's Case* was not that of a director being fixed with the amount of his qualification merely. He had applied for 1000 shares, and subsequently attended a meeting and acted as a director; and the Lord Justice *Rolt* treated that as an acceptance of the shares he had applied for. I do not now rely on the decision in *In re Disderi & Co.* (5), because Mr. *Cotton* is right in saying that there was in that case a question of an agreement to take shares. But I did, in my judgment, express

(1) 4 D. F. & J. 78. (3) Law Rep. 2 Eq. 435.
(2) Law Rep. 3 Ch. 36. (4) Ibid. 438.
(5) Law Rep. 11 Eq. 242.

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the view that a man by becoming a director agrees to take the qualification. However, the point has been decided in *Leeke's Case* (1), and I hope will never be disturbed. Admiral *Leeke* became a director in the company, and fifty shares were allotted to him as his qualification. He never made any application for shares, and no notice of allotment was sent to him; and the Lord Justice *James* says (2): "It is impossible to say that he had not assented to be a director, and that being so, he must be taken to have accepted the qualification of a director, namely, fifty shares." He, therefore, entirely agrees with the view I expressed in *In re Disderi & Co.* (3), that where a man agrees to take the office of a director, and acts as such, he undertakes to accept the qualification. In my opinion the case is one of the clearest upon principle; and Mr. *Harward* must be fixed as a contributory for fifty shares, and pay the costs both here and in chambers.

Solicitors: Mr. *John Tucker;* Messrs. *Francis & Bosanquet.*

(1) Law Rep. 6 Ch. 469. (2) Law Rep. 6 Ch. 473.
(3) Law Rep. 11 Eq. 242.

V.-C. B.
1871
Nov. 3.

SLEEMAN *v.* WILSON.

[1871 S. 187.]

Guardian and Ward—Testamentary Guardian—Illegitimate Children—Trustee and Cestui que Trust—Breach of Trust—Acquiescence.

A testator cannot by will lawfully appoint any one to be guardian of his illegitimate children.

A testamentary guardian is a trustee of such property as comes to his hands in that character.

A testator died in 1810 in *India*, having bequeathed his English property to two infants, whom he acknowledged as his natural children; and having appointed his nephew, *D. E.*, to be their guardian. Part of his property consisted of a bond, dated in 1810, in which he was obligee, the obligor being seised of real estate in *Ireland*. In 1811 *D. E.* obtained possession of the bond from the testator's executor; but he did not register it, nor did he (as it was stated and admitted on demurrer) ever take any steps towards realizing the security. In 1821 the elder of the infants attained twenty-one; in 1832 she married; and in 1833, when (as alleged and admitted on demurrer) the bond had become irrecoverable, *D. E.*, for the first time, informed the elder child and her husband, who were co-Plaintiffs, of the existence of the bond; and upon finding it was then too late to register it, he handed it to the male Plaintiff, directing him to see to it.

No step was taken until *D. E.'s* death in 1870, after which, in 1871, the bill was filed, seeking to make *D. E.'s* estate liable as for a breach of trust. At this time the younger infant was dead, and had no legal personal representative; but his son, who was entitled to administer, was made a Defendant.

Semble, *D. E.* was not at any time liable for any breach of trust; but if he was:—

Held, that the Plaintiffs, by acquiescing for thirty-eight years, and waiting till *D. E.'s* death, had lost their right to make any claim against his estate; and demurrer to the bill allowed.

Quære, whether the bill was not defective for want of parties.

Demurrer.

The bill was filed by *Richard Quinn Sleeman* and *Ann Maria* his wife, against *Townsend Wilson*, *Arthur Thomas Stephens* (executors of Sir *De Lacy Evans*), and *Robert Gleadowe Evans*, alleging to the following effect:—

Prior to September, 1810, the testator in the cause, *Henry Evans*, a major in the *East India Company's* service, advanced to his nephew *John Evans*, of *Limerick*, a sum of £2166 13*s.* 4*d.*, for which amount

John Evans entered into a bond with the testator, conditioned to be void on payment of double the amount and interest at £5 per cent. in the usual manner. He also signed a warrant of attorney for the like amount.

On the 14th of August, 1810, Major *Evans* made a will in the *East Indies*, whereby, after stating that he had two natural children, and that the mother was supposed to be then carrying a third child, he bequeathed the whole of his property "in *England*" at that time, or then "on the seas proceeding to *England*," to be divided equally between them (that was to say) if another child should be born of the mother of the other two in the proper time, that such child was to have one third of "such property in *England*, or proceeding to *England*," the property to be laid out in the funds or other public securities, and allowed to accumulate till the children should respectively attain the age of twenty-one years; deducting annually from the interest such portion as might be necessary for their education and their other expenses. Should either of the children die, the property to be divided between the other two, and in that —— the survivor to be the heir of the other two, provided one should live to the age of twenty-one years. The testator also declared that it was understood that each child attaining the age of twenty-one years was entitled to his or her third or half share, as the case might be. He also requested his friends *J. H. D. Ogilvie*, of *Madras*, *John Binny*, Esq., agent at *Madras*, to be his executors in *India*, and his friend *Cromwell Massey* to be his executor in *England*, and guardian to his children, jointly with *Richard Evans* and *Lacy Evans*, his two nephews.

The testator died in September, 1810, and his will was proved in *India*, and also in *England* by *Cromwell Massey* on the 15th of May, 1812.

The natural children of the testator referred to in the will were two, a girl named *Ann Maria*, who was the present female Plaintiff, and a boy named *Henry*; the mother had no other child. In 1811 they came to *England*, and the bill alleged that, "immediately on their arrival, *Lacy Evans*, one of their testamentary guardians in the said will named, and who was afterwards known as General Sir *De Lacy Evans*, took upon himself, in his capacity of such testamentary guardian as aforesaid, the entire and exclusive care and

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control of the persons and property of" the two children, "and acted as their sole guardian."

In 1811, by *Cromwell Massey's* direction, the bond and warrant of attorney were delivered to Sir *De Lacy Evans* (as the bill alleged) "as such testamentary guardian of" the two children, "and the said Sir *De Lacy Evans* thus became, and was in fact, a trustee of the said debt of £2166 13*s.* 4*d.*, and the interest thereon, for the said infants." The bill proceeded to allege that in 1811 *John Evans*, the obligor of the bond, was seised of considerable real estate, and otherwise possessed of means amply sufficient to satisfy the debt and interest, but that Sir *De Lacy Evans* did not require or attempt to enforce payment; nor did he take any steps, either by registering the bond or otherwise, for making the debt a charge on *John Evans'* real estate; and that, "in consequence of the aforesaid neglect of" Sir *De Lacy Evans*, the debt "became, in the year 1831, irrecoverable, and no part thereof has been paid, and the same has been wholly lost."

In 1821 the female Plaintiff attained twenty-one, and some three years afterwards Sir *De Lacy Evans*, as the bill alleged, "furnished to her what purported to be an account of her share of" the testator's personal estate, "but in such account no mention was made of the said debt of £2166 13*s.* 4*d.*;" and no account was ever rendered to *Henry Evans*.

In 1832 the female Plaintiff married the co-Plaintiff, her present husband.

In 1833, "at which time," the bill alleged, "the said bond debt was irrecoverable," Sir *De Lacy Evans* wrote to the Plaintiff *Richard Q. Sleeman* a letter stating that he had lodged in the hands of a Mr. *George Dartnell* (since deceased), a solicitor of *Limerick*, a bond of *John Evans* for upwards of £1000, which belonged, as he said, to *Ann Maria Sleeman* and her brother *Henry Evans*, and directing him, *Richard Q. Sleeman*, to see to it.

The Plaintiffs alleged that this was the first time that either of them heard of the existence of the bond. *Richard Q. Sleeman* applied to and obtained from Sir *De Lacy Evans* an authority to receive the instrument, and upon his applying for it, Mr. *Dartnell* said that Sir *De Lacy Evans* had given him (*Dartnell*) the bond to be registered in *Dublin*, but had done so many years too late for the

purpose, and that he (*Dartnell*) "could do nothing with it; and he thereupon gave the said bond to the Plaintiff *Richard Quinn Sleeman*, who communicated the purport of the said Mr. *Dartnell's* statement to the said Sir *De Lacy Evans*, and he thereupon referred the Plaintiff *Richard Quinn Sleeman* to his brother, the said *John Evans*."

The Plaintiff *Richard Q. Sleeman* then ascertained that *John Evans* had been declared insolvent.

The bill then alleged as follows: "The Plaintiffs *Richard Quinn Sleeman* and *Ann Maria*, his wife, were not desirous of interrupting the friendly relations which existed between themselves and the said Sir *De Lacy Evans;* and for that reason only they took no steps to recover the said debt and interest from the said Sir *De Lacy Evans* during his lifetime."

John Evans died in 1845. *Henry Evans*, the brother of the female Plaintiff, died in 1866 intestate, never, as alleged, having been aware of the existence of the bond. His son, the Defendant *Robert Gleadowe Evans*, was the person entitled to administer to his estate.

Sir *De Lacy Evans*, having survived the two other persons named as testamentary guardians in the testator's will, died on the 9th of January, 1870.

This bill was filed on the 21st of July, 1871, against the first-named two defendants, his executors, stating and alleging as above, and praying for a declaration that Sir *De Lacy Evans* had committed a breach of trust in neglecting to take steps for the recovery of the debt secured by the bond, and to make the securities a charge on *John Evans'* real estate; and that Sir *De Lacy Evans'* estate might be decreed to make good to the Plaintiffs and the Defendant *R. G. Evans* the loss which had been occasioned by such breach of trust; with other consequential relief.

To this bill the Defendants, the executors, demurred, for want of equity and want of parties.

The Defendant *R. G. Evans* did not appear.

Mr. *Amphlett*, Q.C., and Mr. *Renshaw*, for the demurrer:—

The case of the Plaintiffs is, that, being first aware of their rights

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in 1833, they lay by until 1871, and did not bring this claim till after Sir *De Lacy Evans*' death.

It may be admitted that a testamentary guardian is liable to account for everything he may receive, but the testator could not confer upon anybody the *status* of testamentary guardian of his children, being illegitimate; so that Sir *De Lacy Evans*, if a guardian at all, became what may be called a guardian *de son tort*. At the utmost he was only a constructive trustee; he was not an express trustee of this bond; and even an express trustee will not be held liable after thirty-eight years' delay: *Smith* v. *Clay* (1), cited and followed by Sir *R. P. Arden*, Master of the Rolls, in *Pickering* v. *Lord Stamford* (2); *Beckford* v. *Wade* (3).

The suit is also defective; for if a decree be made, the representative of *Henry Evans*, who does not appear, may file another bill.

Twenty years has been held the limit of time within which a claim of this kind must be brought: *Rolfe* v. *Gregory* (4).

Mr. *Fry*, Q.C., and Mr. *Graham Hastings*, for the bill:—

The objection as to parties is groundless, since the passing of the 15 & 16 Vict. c. 86, s. 42.

As to time, this bond was a *chose in action* of the wife, not reduced into possession by the husband. Hence she was under disability, and time will not run against her. It cannot be said that because the husband might have reduced the property into possession, he must be treated as if he had done so.

Then it is said that Sir *De Lacy Evans* was only a constructive trustee, with a view, probably, to the *Statute of Frauds* (29 Car. 2, cap. 3, ss. 7, 8). But the demurrer admits the statement of fact in the bill that he acted as testamentary guardian; so that, if the law of *India* should be the same as that of *England* with respect to the inability of natural parents to appoint testamentary guardians, the fact remains that Sir *De Lacy Evans* did act as such guardian.

Then *Mathew* v. *Brise* (5), establishes that, "of all the property which he gets into his possession as guardian," a testamentary

(1) Amb. 645; 3 Bro. C. C. 639, n.
(2) 2 Ves. 272, 282.
(3) 17 Ves. 87.
(4) 8 Jur. (N.S.) 606.
(5) 14 Beav. 341, 345.

guardian is "a trustee for the benefit of the infant ward," and no time runs between a trustee and his *cestui que trust.*

The VICE-CHANCELLOR:—A testamentary guardian is a trustee of such property only as comes to his hands.

Mr. *Fry*:—Then the question is, what extent of possession is necessary to make the guardian a trustee. Sir *De Lacy Evans* kept the bond in his own possession from 1811 to 1833, without attempting to enforce, or even registering it. In 1831 it became irrecoverable, and then he waited two years before he informed the Plaintiffs of its existence. This neglect amounts to a breach of trust, against which the statute will not run: *Butler* v. *Foster* (1); and lapse of time alone is not a defence in this Court: *Woodhouse* v. *Woodhouse* (2).

The reluctance of the Plaintiffs to sue Sir *De Lacy Evans* himself, who was the nephew of their natural father, ought not to prejudice their remedy against his estate.

SIR JAMES BACON, V.C.:—

I think the demurrer must be allowed.

It is alleged by the bill that General Sir *De Lacy Evans* was appointed testamentary guardian of the testator's children, but the testator had no more power than any other person to appoint him guardian of these children. It has been suggested that there is some difference between the law of *England* and the law of *India* in that respect. I have no reason for supposing that that is so; but it is enough for the present purpose to say that there is no such allegation in the bill. The will of the testator, though made in *India*, deals with property in *England*, and must be governed by the law of *England*.

In strictness there is nothing whatever in the bill to shew that General Sir *De Lacy Evans* was the guardian of these children; but if he was, his duty of guardian, as I gather from the bill, was faithfully and properly performed; for the bill alleges not only that he took on himself that office, but that, upon the lady attaining twenty-one, an account was rendered to her with which no fault

(1) Law Rep. 5 Eq. 276. (2) Law Rep. 8 Eq. 514.

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was found, and it is stated that in that account no mention whatever was made of the bond in question. The bond seems to have remained in Sir *De Lacy Evans'* hands until 1833, when he sent it to *Ireland* to a Mr. *Dartnell*, directing the Plaintiff Mr. *Sleeman* to see to it. Mr. *Sleeman* thereupon opened a communication with Mr. *Dartnell*, who told him that the bond had been given to him by General Sir *De Lacy Evans* to be registered, but that it was now too late for anybody to register it (I do not know that it was any part of General Sir *De Lacy Evans'* duty to register the bond), "and that he could do nothing with it; and he thereupon gave the said bond to the Plaintiff *Richard Quinn Sleeman*, who communicated the purport of the said Mr. *Dartnell's* statement to the said Sir *De Lacy Evans*, and he thereupon referred the Plaintiff *Richard Quinn Sleeman* to his brother, the said *John Evans*." The particular date of this does not appear; but it must have been in or after the year 1833. Therefore, fairly reading the bill according to its true purport, it appears that in the year 1833, when it was ascertained that the bond could not be registered, it was still a bond available, although not registered, against *John Evans;* and Sir *De Lacy Evans* informed the Plaintiff that he must apply to the debtor, *John Evans*, for payment. That is the statement in the bill, and it appears, or seems to be an inference, that the Plaintiff acted on that; for the next statement is, that "the said *John Evans* at that time had been declared an insolvent under the statutes then in force for the relief of insolvent debtors," and that "his estate had produced, and would produce, no dividend for his unsecured creditors." I cannot conceive that up to that time General *Evans* had neglected any duty which properly belonged to him. I entirely adopt the authority of the case at the Rolls, which Mr. *Fry* cited, of *Mathew* v. *Brise* (1). It is not to be disputed that if a person appointed guardian, in that character possesses himself of any of his ward's property, of that property he becomes a trustee, although he is only a trustee by construction, and not appointed by name.

Here there is no suggestion that General *Evans* ever possessed himself of any part of the property of the Plaintiffs for which he did not account.

(1) 14 Beav. 341.

But then comes this passage in the bill, which, in my opinion, puts an end to the case, and places it decidedly within the plain doctrine of the Court, that persons who sleep on their rights, or acquiesce in a state of circumstances in which their rights are lost sight of, cannot, after a lapse of time, enforce remedies which they might have had; although I do not think in this case they ever had any.

The statement to which I refer is extremely distinct and significant: "The Plaintiffs *Richard Quinn Sleeman* and *Ann Maria*, his wife, were not desirous of interrupting the friendly relations which existed between themselves and the said Sir *De Lacy Evans;* and for that reason only they took no steps to recover the said debt and interest from the said Sir *De Lacy Evans* during his lifetime." Now, what does that mean? They are apprised that the bond cannot be registered. They say they were acquainted with the fact that *John Evans* was an insolvent debtor and unable to pay; they were referred to *John Evans* by Sir *De Lacy Evans*, who must be taken to have repudiated all responsibility as to the bond; and then these relatives (who, though not legitimate, were still not improperly called relatives), because they do not wish to interrupt the friendly relations which existed between them and the man who, they now say, is their defaulting trustee, for all these years from 1833 to 1871, take no step whatever. If there can be a case of acquiescence, this is one of the strongest cases that can be suggested, and it furnishes an inference that there was some other reason than merely the friendly relations which existed for their not pressing Sir *De Lacy Evans.* If they had, in the year 1833, as they might have done, proceeded against Sir *De Lacy Evans*, alleging breach of trust, he, being then alive, might have been able to say what nobody can even guess at now; but they wait till Sir *De Lacy Evans* is in his grave before they raise anything like a question on this subject.

Upon the ground of acquiescence, therefore, it is that I decide this case; and I think, beyond all hesitation or doubt, that it is a case in which the demurrer must be allowed.

It accordingly becomes unnecessary to consider the other ground of demurrer; but if it had been necessary, I think I should have required to know more about the facts than appears from the statements in this bill before I came to the conclusion that the objection

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for want of parties had been removed by the Act of Parliament. But I do not trouble myself about that, because I decide this case solely on the ground of acquiescence. The demurrer must be allowed with costs.

Solicitors for the Plaintiffs: Messrs. *Deane & Chubb.*

Solicitors for the demurring Defendants: Messrs. *Stephens & Langdale.*

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GREENE *v.* WEST CHESHIRE RAILWAY COMPANY.

[1870 G. 1.]

Specific Performance—Railway Company and Landowner—Agreement by a Railway Company to make Accommodation Works on Land of a Vendor other than that taken by the Company.

9 Ch 334
20 Eq 107

An agreement was entered into between a railway company and a landowner, part of whose land had been, under another agreement, taken by the company, whereby, in consideration of the previous withdrawal by the landowner of a Petition to Parliament against the company's bill, the company agreed to construct and for ever maintain at their expense a siding of specified length alongside the line upon land belonging to the landowner, and to be provided by him for that purpose, for the use and to the reasonable satisfaction of the landowner:—

Held, that this agreement was not incapable of being enforced by a Court of Equity.

The Court will not refuse to decree specific performance of an agreement, although the Plaintiff may have a concurrent remedy in damages, or may have entered into a negotiation for a money compensation which has failed.

MOTION FOR DECREE.

By an agreement dated the 31st of December, 1861, and made between the Defendants, the *West Cheshire Railway Company*, under their common seal, of the one part, and the Plaintiff, *James Greene Hatton Greene*, of *Bellevue*, in the county of *Chester*, Esq., of the other part, after reciting that the company had obtained an Act of Parliament on the 11th of July, 1861, for incorporating the company, and for authorizing them to make and maintain certain railways; and that by the same Act the company were empowered to run through certain lands belonging to the Plaintiff; and that previously to the passing of the Act the

Plaintiff petitioned Parliament against the bill then pending; but that, in consideration of an agreement entered into between the provisional directors of the undertaking and promoters of the bill, and the Plaintiff, dated the 2nd of May, 1861, the Plaintiff withdrew his petition; and that by the same agreement of May, 1861, it was agreed that, on the passing of their Act, the company should, if required, put their seal to an agreement embodying the terms of the agreement of the 2nd of May, 1861; it was witnessed that it was mutually agreed between the parties as follows:—

"The said railway company shall construct, contemporaneously with the construction of the said railway, and for ever thereafter maintain, at their own proper expense, a sufficient siding of at least 100 yards in length alongside the line of railway, as constructed through the land of the Plaintiff, and upon land belonging to the Plaintiff, and to be provided by him for that purpose, for the use of and to the reasonable satisfaction of the Plaintiff.

"Every difference which shall arise between the parties to this agreement in regard to the preceding article, or as to the mode of carrying the same out, or otherwise touching the premises, shall be referred to and determined by arbitration between the said parties to this agreement, according to the provisions, with respect to the settlement of disputes by arbitration, of the *Companies Clauses Consolidation Act*, 1845."

By certain Acts of Parliament the second Defendants, the *Cheshire Lines Committee*, were authorized and empowered to construct and complete the line of railway and works of the first Defendants, the company; and in exercise of such powers they took, and proceeded to construct the line through, the Plaintiff's land.

On the 31st of July, 1868, the Plaintiff's solicitor wrote to the company's solicitors, informing them that he had received the Plaintiff's instructions to obtain a performance of the agreement, and that he should be glad to hear from them, as it was now time the siding was made, "as I am informed the railway is just being completed." In a second letter, dated the 3rd of August, 1868, the Plaintiff's solicitor again called upon the company to carry out their part of the agreement with regard to the siding, adding,

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"I hope there will be no difference between the parties upon which the necessity of an arbitration will arise."

On the 5th of August Defendants' solicitors in answer said: "We cannot see the urgent necessity there is to make the siding until our railway shall be nearly complete, and think that your client had better see our engineer on the spot to agree as to the manner of construction."

Other correspondence followed, which took the form of a negotiation for a money compensation; but all offers were expressly made without prejudice, and no agreement was come to. Finally, on the 5th of September, 1868, the company's solicitors wrote as follows: "We thought the siding of so little value to any one that we never imagined Mr. *Greene* would ask for it . . . . Frankly, we think the proposal of your client that we should pay to be let off making the siding is simply a means of extortion. We do not object to pay a small sum, say one-fourth of the estimated cost of the siding, but not more. This without prejudice."

On the 21st of October, 1869, a notice, dated the day preceding, signed by the Plaintiff, and addressed to both of the Defendants, was served upon each, which, as far as material, was as follows:—

"I, the undersigned, . . . hereby give you and each of you notice, that I require you, in pursuance of the undertaking in this behalf, on the part of the said railway company, contained in certain articles of agreement dated the 31st day of December, 1861, . . . forthwith to construct, contemporaneously with the construction of the said *West Cheshire Railway*, and before the same shall be opened for public traffic, and for ever thereafter to maintain at your or one of your own proper expense, a sufficient siding," &c. (following the exact words of the agreement): "And I further give you and each of you notice, that I have provided, and do provide and put at your disposal, such quantity of land belonging to me, adjoining and lying alongside and to the north-west of the said line of railway as constructed through my land, as shall be required for the proper construction of the said siding; and I do require and authorize you, and each or either of you, and you and each or either of your engineers, contractors, servants, and workmen, with or without horses, waggons, and carriages, forthwith, and from time to time, to enter into and upon the same land,

or any parts or part thereof, and thereon, or on some parts or part thereof, to construct such siding accordingly."

The bill was filed in January, 1870, stating as above; and that, notwithstanding service of the above notice, the Defendants refused to construct the siding, and intended, unless restrained, to open the line without so doing; and prayed for specific performance, and an injunction accordingly, against "the Defendants respectively, or some of them."

Shortly afterwards an injunction was moved for, and ordered to stand to the hearing.

Answers were filed by both Defendants in February, 1870, in similar terms, setting up the following defences: First, that the Plaintiff had not provided any land, and that as to the land mentioned in the notice, it was subject to a mortgage, and the mortgagees threatened to sell or foreclose, and refused to allow the Defendants to enter upon it; secondly, that they believed the Plaintiff had no occasion for the siding, and that, if constructed, it would be of no use to him, inasmuch as there were already two sidings and wharves within half a mile, which, being station sidings, possessed great advantages over a private one; and they submitted that it appeared from the correspondence and from the Plaintiff's conduct that his object was not to have a siding constructed according to the agreement, but to have a money payment in lieu of the same; thirdly, that, having regard to the nature of the agreement, a Court of Equity could not or would not decree specific performance of it; and, fourthly, that the Plaintiff's remedy, if any, was an action for damages.

The Defendants' evidence shewed that on the 25th of October, 1869, their solicitors sent a copy of the notice to the solicitor of the mortgagees, who, in acknowledging the receipt, observed that the siding would be of great benefit to the estate, and that it met with the approval of his clients, "to whom any compensation money must be paid." On the 28th of October, the Defendants' solicitors again wrote to the solicitor of the mortgagees, asking him, when he had further considered the matter, to say whether his clients would decline to allow land to be used for the purpose of a siding.

A correspondence followed, in the course of which the solicitor of the mortgagees, on their behalf, at first declined to give the

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requisite authority for entry by the Defendants on the land; but at the close he withdrew the refusal, and declined, on behalf of the mortgagees, to be mixed up in the Chancery proceedings, or in any dispute between the Plaintiff and the Defendants.

On behalf of the Plaintiff it was denied that the mortgagees intended to sell or foreclose the land.

It further appeared from the evidence that at first, namely, before or up to August, 1869, the Plaintiff wished to have the siding on some land on the other side of the line, which was not in mortgage; but in or about that month he changed his mind, and ever since he had insisted upon the Defendants constructing it on the mortgaged land.

Mr. *Amphlett*, Q.C., and Mr. *Townsend*, for the Plaintiff:—

The fact that a negotiation for a money compensation was entered into and failed, does not reduce this to a mere money claim.

The Plaintiff's delay, if any, in making his demand was in compliance with the Defendants' own request.

The conduct of the Defendants in interfering between the Plaintiff and his mortgagees was most unjustifiable.

The Plaintiff is entitled to specific performance, though he may have a remedy in damages: *Storer* v. *Great Western Railway Company* (1); *Lytton* v. *Great Northern Railway Company* (2); *Wilson* v. *Furness Railway Company* (3).

Mr. *Kay*, Q.C., and Mr. *Speed*, for both Defendants:—

The Court has, in too many instances, permitted demands to be enforced against public companies, which, as against individuals, would be considered extortionate.

Where there has been a negotiation for damages, it is a rule that the Court will not grant specific relief: *Senior* v. *Pawson* (4).

But here specific relief cannot be applied. This is not an agreement to purchase land, only to withdraw opposition to a petition; and the company are called upon to make these works, not on land purchased by them, but "upon land belonging to" the Plaintiff, and "to be provided by him for that purpose." If a

(1) 2 Y. & C. Ch. 48.
(2) 2 K. & J. 394.
(3) Law Rep. 9 Eq. 28.
(4) Ibid. 3 Eq. 330.

landowner contracts for accommodation works to be constructed on the company's land, as in the cases cited on the other side, the Court can decree specific performance, but not where the works are to be done on the Plaintiff's land: *South Wales Railway Company* v. *Wythes* (1). The company could not obtain a decree compelling the Plaintiff to find the land; hence there is no mutuality. The finding of the land must be a matter of future arrangement, so that the contract is not complete. The parties, moreover, have contracted to refer any subject of dispute. Nor could the Plaintiff compel the Defendants to make a siding wherever he pleased; as, for example, in the middle of a cutting or an embankment, where the expense would be exorbitant. It must be made to his "reasonable" satisfaction. On all these grounds the Court will not act in this case, but leave the Plaintiff to his remedy in damages.

The Plaintiff's conduct shews that his object was compensation.

No specific performance has ever been, or, it is submitted, ought to be granted of such an agreement as this: *Buxton* v. *Lister* (2).

As the siding was to be made on the Plaintiff's land, he has only to make the siding himself and recover damages from the company. He can get communication with the railway by the powers of the *Railways Clauses Act*, 1845 (8 Vict. c. 20), s. 76.

[They also cited *Errington* v. *Aynesly* (3), *Flint* v. *Brandon* (4), and *Pollard* v. *Clayton* (5).]

Nov. 7. SIR JAMES BACON, V.C.:—

I wholly disclaim the notion that a railway company is to be dealt with in this Court upon any other principles than those which would and ought to be applied to individuals. Their contracts are to be considered just as any other contracts; their rights and their obligations are in all respects the same as those of any members of the community. They possess certain privileges different from, and in some respects beyond, those of individuals; but

(1) 1 K. & J. 186; 5 D. M. & G. 880.
(2) 3 Atk. 383.
(3) 2 Bro. C. C. 341
(4) 8 Ves. 159.
(5) 1 K. & J. 462.

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while it is the duty of the Court to respect and to secure the enjoyment of those privileges, it is no less an imperative duty to take care that the powers with which the Legislature has entrusted them, and which are inherent in their constitution, are not so exercised as to protect them in doing wrong, or in escaping from the fulfilment of their lawful engagements.

Nothing can be plainer than the engagement entered into by the railway company which forms the subject of the present suit. The company desired to make a certain railway through, among others, the lands of the Plaintiff. He resisted this design. He petitioned Parliament—without whose authority the railway could not be made—against the bill which they had presented. Whether he would or would not have succeeded in his opposition cannot now be ascertained. The promoters of the company, however, were so moved by his opposition that they thought it prudent to come to terms with him. They proposed or agreed that, if he would permit them to acquire, under the terms prescribed by the statute (and which are the same as those applicable in all such like cases), so much of his land as they required for their undertaking, they would, in making their railway, make a siding out of that railway upon land belonging to the Plaintiff. The Plaintiff acceded to these terms, and relying upon the performance of the obligation thus assumed, withdrew his opposition. The bill passed. The company undertook, by an agreement under their common seal, to perform the promise of the promoters. They have taken such land of the Plaintiff as they required; the Plaintiff has performed his part of the contract; the company have made and opened their railway, and they now refuse to perform the other part of that contract, by force of which alone they acquired possession of the Plaintiff's land.

A more direct, wilful, and determined violation of a plain contract cannot be suggested. No excuse is offered for it—no suggestion that it is impracticable, or even that it is inconvenient, for the company to perform their part of the contract of which the Plaintiff has performed his; but what they say is, that the Plaintiff may, by an action at law, recover against them in money such amount of damages as a jury may think he has sustained by their wilful breach of their contract; and that, therefore, a Court of

Equity will not entertain the complaint. I do not understand that the law, as administered in this Court, countenances any such defence. If that were the law, the great majority of the cases in which this Court has exercised its authority for the purpose of compelling specific performance of contracts might be readily disposed of, because in the great majority of cases a payment in money might satisfy the wrong which the breach of such contracts inflicts. But it would be a total departure from all principles by which the administration of this branch of the law has hitherto been guided, to hold that it is at the option of a man who has persuaded another to part with his rights upon a specific condition to say: "I can, but I will not, perform the obligation I have entered into; and instead of keeping faith, and honestly fulfilling my promise, I will leave you to take the chances of an action for damages, and reserve to myself the power of endeavouring to defeat your claim; and, instead of acknowledging your just rights, will compel you to receive, instead of them, such a sum as I may be able to persuade a jury will compensate you for the loss and injury and disappointment which my wilful wrongdoing may have occasioned to you." If this were said or done by an individual, the injustice would be too glaring to be endured; can it be less when it is done by a corporation? Is it because a joint-stock company cannot be affected by any conscientious principle, or any feeling of honour, or any fear of forfeiting the good opinion of others, that a different rule of law is to be applied to them than would be applicable to an individual? I am as unwilling as any one can be to enforce against a company obligations to which private persons are not subject; but I should be acting in direct opposition to what I am satisfied is not less the plain law than it is the plain honesty of the case, if I were to countenance, on the part of the company, so gross a violation of their duty as they are endeavouring to practise in this case.

The case of *Storer* v. *Great Western Railway Company* (1) appears to me to establish principles which are here directly applicable. It is said that the case may be distinguished in this respect: that the work which the company had there undertaken to make, and the performance of which they endeavoured to evade, was to be

(1) 2 Y. & C. Ch. 48.

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performed on their own land, while here the requisite work is to be performed on the Plaintiff's land. But the Plaintiff has undertaken, and is willing and able, to provide the requisite land, and the work to be done is merely a collateral continuation of that railway which the company have made upon land which was the Plaintiff's, and which has become theirs only upon the condition that they would so continue their railway.

That there may be cases in which the Court may be unable to do full justice in the way of specific performance is true, and by the imperfection of the contract itself, the Court may be unable to effect that which it would wish to perform.

Such a case is presented in the case of the *South Wales Railway Company* v. *Wythes* (1), where, from the vague and fragmentary nature of several of the stipulations in the contract, the Court was unable to carry it into effect. But no such difficulty arises in the present case. The length of the siding is prescribed by the agreement. The land is provided. The company has nothing to do but to continue their rails into that land which the Plaintiff offers them. There is nothing vague or uncertain in the matter, and if they should be decreed to continue their railway by means of the siding they have undertaken to make, there can be no doubt of the power of the Court to enforce such a decree so as to ensure a full and specific performance of the contract.

The observations in *Wilson* v. *Furness Railway Company* (2) apply directly and forcibly to this case, and I avail myself of those observations in coming to my present decision.

I have not thought it necessary to observe more particularly upon part of the case which occupied a large portion of the Defendant's answer, and of the evidence which has been adduced. The Defendants, it appears, in furtherance of their design to evade the performance of their contract, endeavoured to prevail upon the Plaintiff's mortgagees of the land on which the siding is to be made to withhold their assent to that use of the land. The attempt, which at first promised to be successful, failed when the mortgagees became acquainted with the true facts of the case; and the only result is, that the Defendants have proved that, in their

(1) 1 K. & J. 186; 5 D. M. & G. 880. (2) Law Rep. 9 Eq. 33, 34.

endeavour to baffle the Plaintiff's just demands, and to defeat his rights, they have not scrupled to resort to very unfair practices.

There will be a decree for specific performance in the terms of the first paragraph of the prayer of the bill; the Plaintiff undertaking to point out within one month the land on which the siding is to be made; either party to have liberty to apply; and the Defendants to pay the Plaintiff his costs of the suit, including the costs of the motion for injunction.

Solicitor for the Plaintiff: Mr. *Henry Smith.*

Solicitors for the Defendants: Messrs. *Cunliffe & Beaumont,* agents for Messrs. *Lingards & Rowell, Manchester.*

CORCORAN *v.* WITT.

[1870 C. 83.]

Practice—Unsuccessful Motion—Costs.

In a partnership suit Plaintiff moved for a receiver and injunction, and the motion, which was opposed by Defendant, was ordered to stand till the hearing, upon an undertaking by both parties to concur in transferring the partnership account to the bankers of the firm, and to pay to such account all assets of the firm that should reach their hands, and not to pay or apply any of the partnership assets except for partnership purposes. No directions were given by the Court as to the costs of the motion. The common order dismissing the bill for want of prosecution was subsequently obtained on Defendant's application, the Court refusing to make any order as to the costs of the motion for a receiver:—

Held, that these costs were costs of an unsuccessful motion, and as such, costs in the cause, payable by Plaintiff.

ADJOURNED SUMMONS on behalf of Plaintiff for the purpose of obtaining a review of the taxation of the Defendant's costs, on the ground that the Taxing Master had wrongly allowed Defendant his costs of an interlocutory motion as costs in the cause.

The suit prayed a dissolution of the partnership between Plaintiff and Defendant, an account, and a receiver; and in May, 1870, Plaintiff moved for the appointment of a receiver of the partnership property, and an injunction. The motion, which was

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opposed by Defendant, was ordered to stand till the hearing, upon an undertaking by Defendant and Plaintiff to concur in transferring the partnership account from the *Consolidated Bank* to *Barnetts, Hoare, & Co.*, and to pay to such account all assets of the firm that should reach their hands, and not to pay or apply any of the partnership assets except for partnership purposes. No directions were given by the Court with respect to the costs of the motion.

An order dismissing the bill for want of prosecution was, on the 4th of May, 1871, made on Defendant's application. On this motion, counsel for Defendant moving asked the Court to direct payment by Plaintiff of Defendant's costs of the motion for a receiver, but the Court refused to make any order as to such costs, or to make any other than the common order dismissing the bill for want of prosecution.

The Taxing Master allowed Defendant his costs of the motion, on the ground that the Plaintiff having failed in obtaining an order for a receiver, and subsequently allowed his bill to be dismissed for want of prosecution, the opposition on the part of Defendant was a successful opposition; and that the costs not having been reserved, and no direction given as to them on the hearing of the motion, it was open to the Defendant to claim them on the ground of having made a successful opposition. The Plaintiff took out a summons to review the taxation, which was adjourned into Court.

Mr. *Amphlett*, Q.C., and Mr. *C. A. Holmes*, in support of the application:—

The costs of the motion for a receiver, on which no order was made, ought not to have been allowed to the Defendant as costs in the cause. The motion not having been dismissed, was so far a successful motion that the Defendant was not entitled to his costs of opposing it as costs in the cause, according to Sir *J. Leach's* statement of the rules (1), and *Mounsey* v. *Earl of Lonsdale* (2). As there was no reservation of these costs until further order, and the hearing has become impossible by the order to dismiss for want of prosecution, no order can now be made upon

(1) 1 S. & S. 357. (2) Law Rep. 10 Eq. 557.

them, and they cannot be claimed by the Defendant as costs in the cause: *Rumbold* v. *Forteath* (1); *Jones* v. *Batten* (2); *Daniell's* Ch. Pr. (3). Where, however, the suit is a mere injunction suit, and the motion is part of the machinery for the final determination of the cause, a different rule has prevailed, and the Defendant's costs of opposing the motion which has been directed to stand over until an action has been tried will be costs in the cause, payable to him on the bill being dismissed with costs: *Stevens* v. *Keating* (4); *Betts* v. *Clifford* (5). But in this case the motion for a receiver was not a necessary part of the machinery for the final determination of the cause, and the Defendant, by obtaining an order to dismiss for want of prosecution, has rendered it impossible for the Court to determine upon the merits the result of the motion so far as the costs are concerned.

Mr. *Kay*, Q.C., and Mr. *Nalder*, for the Defendant, were not called on.

SIR JAMES BACON, V.C., said that the Plaintiff's motion for a receiver was an unsuccessful motion, and upon the authorities the costs of that motion were costs in the cause; the present motion must be refused with costs.

Solicitors: Messrs. *Clowes, Hickley, & Steward*; Messrs. *Flower & Nussey.*

(1) 4 Jur. (N.S.) 608.
(2) 10 Hare, App. xi.
(3) Pages 715, 1240.
(4) 1 Mac. & G. 659.
(5) 1 J. & H. 74.

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Nov. 6, 7, 10.

SYKES *v.* SYKES.

[1871 S. 147.]

Devise of Estates for Life—Term of 500 Years—Devise of Estates in Tail—Trusts to raise a Sum of Money—Remoteness—Demurrer.

A testator in 1803 devised estates to his eldest son *R.* for life, with remainders to his grandson *R.* for life; to trustees to preserve contingent estates; to other trustees for 500 years upon certain trusts; to the first and other sons of his grandson *R.* in tail male; and in default of issue, to the second and other sons of his son *R.* in tail male; and in default of issue to his son *N.* for life; to the same trustees to preserve contingent estates; to the first and other sons of *N.* in tail male; with remainders over in favour of other sons for life and their issue in tail.

The limitation of the term was for the purpose of enabling the trustees, by mortgage or otherwise, in case any one or more of the testator's younger sons, or their issue, should become seised in possession by virtue of the limitations of the estates devised to his son *R.* for life, with remainders over, to raise a sum of £5000 for the benefit of such of the testator's sons (except the son in possession of the estates) as should be then living, or their issue.

The testator's eldest son had no son other than the testator's grandson *R.*, who died on the 24th of February, 1870, without issue, and the estates devolved upon the infant Defendant, a grandson of the testator's son *N.*

The Plaintiffs were a younger son of *N.*, and the son of the testator's younger son *H.*:—

Held, on demurrer to a bill praying a declaration that according to the true construction of the will, and in the events which had happened, the sum of £5000 was validly charged upon the estates, and was now raiseable with interest at 4 per cent. from the 24th of February, 1870, that the charge failed for remoteness.

Case v. *Drosier* (1), followed.

JOSEPH SYKES, who died in November, 1805, by will, in June, 1803, gave and devised to his eldest son *Richard Sykes* and his assigns, certain manors, tenements, and hereditaments, situate in the county of *York*, to hold the same to the use of his son *Richard* and his assigns during his life, without impeachment of waste; and from and after the decease of his son *Richard* to the use of his grandson *Richard Sykes*, the eldest son of his son *Richard*, and his assigns during his life, without impeachment of waste; and from and after the determination of that estate to the use of his nephews the Rev. *Thomas Francis Twigge* and the Rev. *Miles Popple*, and

(1) 2 Keen, 764; 5 My. & Cr. 246.

their heirs, during the life of his said grandson, upon trust to preserve the contingent estates thereinafter limited; and from and after the decease of his said grandson to the use of *William Bourne* and *Thomas Thompson*, their executors, administrators, and assigns, for the term of 500 years thence next ensuing, upon such trusts, nevertheless, and subject to such provisoes as were thereinafter expressed; and from and after the end or sooner determination of the said term, and in the meantime subject to the trusts thereof, to the use of the first son of the body of the said grandson lawfully to be begotten, and the heirs male of the body of such first son; and for default of such issue, to the use of the second, third, and all and every other the son and sons of the body of his said grandson, severally and successively, according to priority of birth, and the heirs male of the body and bodies of all and every such son and sons; and for default of such issue, to the use of the second, third, and all and every other the son and sons of his son *Richard*, according to priority of birth, and the heirs male of the body and bodies of all and every such son and sons; and for default of such issue, to the use of his son *Nicholas* and his assigns during his life, without impeachment of waste; and from and after the determination of that estate to the use of *Thomas Francis Twigge* and *Miles Popple*, and their heirs, during the life of his son *Nicholas*, upon trust to preserve the contingent estates thereinafter limited; and from and after the decease of his son *Nicholas*, to the use of the first son of the body of his son *Nicholas*, and the heirs male of the body of such first son; and for default of such issue, to the use of the second, third, and all and every the son and sons of his son *Nicholas*, according to priority of birth, and the heirs male of the body and bodies of such son and sons; and for default of such issue there were limitations of the same estates in favour of his sons *Daniel*, *Henry*, and *John*, and their sons successively, in terms similar to those expressed in regard to his son *Nicholas* and his sons; and for default of such issue a limitation to the use of his daughter *Marianne Thornton* and her assigns, during her life, without impeachment of waste, with divers remainders over.

After making certain pecuniary and specific bequests, the testator devised other estates to the use of his son *Daniel* and

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his assigns during his life, and after the determination of that estate, to the use of *Thomas Francis Twigge* and *Miles Popple*, and their heirs, during his life, to preserve contingent remainders; and after the decease of his son *Daniel* to the use of *William Bourne* and *Thomas Thompson*, their executors, administrators, and assigns, for the term of 500 years thence next ensuing, upon such trusts as were thereinafter expressed concerning the same; and from and after the determination of the said term of 500 years, and subject to the trusts thereof, to the use of the first son of the body of his son *Daniel*, in tail male, with remainder to the use of the second, third, and all and every other the son and sons of the body of his son *Daniel*, according to priority of birth, in tail male. As to these estates, there were remainders to the use of the testator's sons *John*, *Nicholas*, *Henry*, and *Richard*, and their sons successively, in terms similar to those expressed in regard to his son *Daniel* and his sons, with remainders to the use of the testator's grandson *Richard* during his life; and of the trustees; of the sons of such grandson successively; and of his daughter *Marianne Thornton* during her life, with divers remainders over.

After empowering each of his sons, when seised in possession of the hereditaments and premises so limited to him for life, to make a settlement by way of jointure upon his wife, and empowering his grandson *Richard*, during the lifetime of his father and before he came into possession of the estates so limited to him for life with remainders over, to make a settlement by way of jointure upon his wife of any competent part of the said estates; the testator, as to, for, and concerning the said two several terms of 500 years thereinbefore devised to *William Bourne* and *Thomas Thompson*, declared that the same were so respectively devised to them upon the trusts and for the ends, intents, and purposes thereinafter mentioned; that was to say, that in case any one or more of his younger sons, or their respective issue, should become seised in possession by virtue of the limitations of the hereditaments and premises thereinbefore devised to the testator's said son *Richard* for his life, with remainders over for want of issue male of his body, upon trust that *William Bourne* and *Thomas Thompson*, their executors, administrators, and assigns should, by mortgage

and demise of the said term of 500 years, of and in the said premises, or a competent part thereof, or by such other ways and means respecting the same as they should be advised, raise, levy, or borrow the sum of £5000, and pay and apply the same to and amongst such of the testator's sons (save and except such son as should be seised in possession) as should be then living, or their issue if dead, such issue to take the respective shares of their parents, in equal proportions if more than one; but if only one, to such only son or his issue. There was a provision that in case the hereditaments and premises above devised to his son *Richard* for life, with remainders over, as well as those devised by him to his son *Daniel* for life, with remainders over, should, by virtue of the foregoing limitations, devolve upon any one of his sons, his will was that such son, or his issue, in case there should be more than one of his sons then living, should be entitled to only one of the entailed estates at his election, and the other should go to and devolve upon the next in succession or his issue. But in case both the said estates above devised to his sons *Richard* and *Daniel* respectively for life, with remainders over, should devolve upon one only surviving son or his issue, then upon trust that *William Bourne* and *Thomas Thompson*, their executors, administrators, and assigns should, by the ways and means aforesaid, levy and raise or borrow the further sum of £6000, and pay and apply the same to and amongst the female issue, if any, of his sons in equal proportions, save and except the female issue of such son, upon whom the estates should devolve in manner above mentioned: and there were other provisions whereby he declared his will to be that in case the hereditaments and premises devised by him to his son *Richard* for life, with remainders over, should, by virtue of the foregoing limitations, devolve upon his son *Nicholas*, or any son of his son *Nicholas*, then upon trust and his will was that *William Bourne* and *Thomas Thompson*, their executors, administrators, and assigns should, by the ways and means aforesaid, levy and raise the further sum of £16,000, and pay and apply the same to and amongst the children of his son *Nicholas*, save and except such son upon whom the estates should devolve by virtue of the foregoing limitations, in equal shares and proportions; that in case his son *Daniel* should have issue male, and also one or more other child or children, whether

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sons or daughters, or leave issue only one child, and that a daughter, then upon trust and his will was that *William Bourne* and *Thomas Thompson*, their executors, administrators, and assigns should, by the ways and means above mentioned, raise and levy or borrow the sum of £5000 upon security of the hereditaments and premises above devised to his son *Daniel* for life, with remainders over, and pay and apply the said sum of £5000 to and amongst such children (if more than one) except an eldest son; or to such only child (if a daughter) at such time and in such manner and proportion as his son *Daniel* should, by deed or will, appoint; and for want of such appointment, then equally amongst such children (except as aforesaid) if more than one, and if an only daughter, to such only daughter; and that as soon as the several sums of £5000, £6000, £16,000, and £5000 should, upon the events and contingencies aforesaid, be raised in manner above mentioned; or in case the same, upon the events aforesaid, should be paid, or with the approbation of *William Bourne* and *Thomas Thompson*, their executors, administrators, and assigns, should be secured by such person or persons as for the time being should be next in remainder expectant on the two several terms of 500 years, according to the true meaning of that his will, then and in either of those cases, and at all times thenceforth, the said several terms of 500 years should cease, determine, and be utterly void, anything therein contained to the contrary thereof notwithstanding.

By a codicil dated in December, 1803, the testator appointed *William Joseph Denison* to be a trustee of his will in the place of *Thomas Francis Twigge*.

Upon the testator's decease his eldest son, *Richard Sykes*, entered into possession of the settled estates devised to him for life, and he continued in such possession until his death on the 3rd of March, 1832. The testator's grandson, *Richard Sykes*, the only son of *Richard Sykes* the son, upon the death of his father, entered into possession of the said estates, and continued in such possession until his death on the 24th of February, 1870, without having ever been married.

The testator's son, *Nicholas Sykes*, died on the 29th of April, 1827. He had thirteen children, of whom the Plaintiff *Daniel Sykes*, a younger son, and three daughters, only were living.

Joseph Sykes, the other Plaintiff, was the only son of the testator's son *Henry*, who died in 1844.

The eldest son of *Nicholas* died a bachelor; but his second son, *Joseph*, who died in 1857, had ten children, the eldest son of whom died a bachelor; but the second son, who died in 1865, had three children, and the eldest, viz., *Charles Percy Sykes*, an infant, was the Defendant.

The Plaintiff *Daniel Sykes* was now the sole trustee of the 500 years' term first above mentioned.

The Defendant was by his guardians in possession of the estates which were settled upon *Richard Sykes* for life, with remainders over, and upon his entering into such possession it was considered, on behalf of the persons claiming to be interested in the first-named sum of £5000 directed to be raised under the trusts of the said 500 years' term, that the time had arrived for raising it, and they accordingly applied to the Plaintiff *Daniel Sykes* as the present termor, and requested him to take the necessary steps for that purpose; but on the part of the Defendant an objection was raised that such charge was too remote and void, and that the sum could not now be raised; and thereupon the Plaintiffs, in June, 1871, filed this bill praying for a declaration that, according to the true construction of the will, and in the events which had happened, the sum of £5000, charged by the will upon the estates devised to the testator's son *Richard* for life, with remainders over in default of issue male of his body, was validly and effectually charged upon those estates, and was now raiseable out of the rents and profits of those estates, or by sale or mortgage of a competent part thereof for the residue of the term; and that proper directions might be given for raising the same with interest at £4 per cent. from the 24th of February, 1870, until payment.

The Defendant demurred for want of equity, and the demurrer now came on for argument.

Mr. *Bristowe*, Q.C., Mr. *Ramadge*, and Mr. *Graham Hastings*, for the Defendant:—

The contingency on the happening of which the £5000 was to be raised is too remote. In *Case* v. *Drosier* (1) there was a term of

(1) 2 Keen, 764; 5 My. & Cr. 246.

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500 years, out of which charges were to be raised by the trustees antecedent to the estate tail, and the Master of the Rolls said the testator had directed the sums to be raised on the failure of issue, which might be at a very remote period, and there were no means by which the charges could be barred, as they depended on a term which was precedent to the estate tail; so that after a recovery there would remain a term and a trust to be performed—a trust which could not be defeated, and a term which could not be destroyed. In that case the demurrer was allowed. Here there is no gift of the £5000 except in the declaration of the trusts of the term. It may be contended that if the sons of *Richard Sykes* the grandson, or the younger sons of *Richard Sykes* the son, barred the entail, they would thereby prevent the contingency from happening on which the £5000 was raiseable, and that therefore the charge of the £5000 was not open to any objection on the ground of remoteness. The general rule, however, is, that if an executory limitation does not necessarily vest within a life in being and twenty-one years afterwards, it is void for remoteness. Sometimes it has been said that there is an exception to the rule in cases where the executory limitation comes after an estate tail—that it is not obnoxious to the rule against perpetuities, because the entail can be barred; but the destructibility of a limitation is not a test as to whether it is or is not void for remoteness, and notwithstanding there are cases in which that could have been done, yet it has constantly been held that a series of contingent life estates were void; and their destructibility did not necessarily prevent the limitations being open to the objection of their being void on the ground of remoteness. It is submitted that the Court will follow this rule, gathered from the authorities, unless it can see something clear and distinct in the language of this will to enable it to say that the contingency is not too remote. The question always is,—Is there anything in the limitation which trenches upon the rule of law against perpetuities?—the rule which does not allow of a limitation of successive contingent estates for life, nor of accumulations during a period tending to a perpetuity: *Seaward* v. *Willock* (1); *Lade* v. *Holford* (2); *Marshall* v.

(1) 5 East, 198. (2) Amb. 479.

Holloway (1); *Lord Southampton* v. *Marquis of Hertford* (2); *Browne* v. *Stoughton* (3); *Scarisbrick* v. *Skelmersdale* (4); *Turvin* v. *Newcome* (5); *Sanders* on Uses and Trusts (6).

These cases shew that the trusts would have been barred at once if the tenant in tail had barred the entail, and also that destructibility is not a test as to whether limitations are void for remoteness. Sometimes it has been questioned whether even the barring of the entail would destroy the trusts of the term: *Peacocke* v. *Pares* (7); *Collingwood* v. *Stanhope* (8). Before the statute 8 & 9 Vict. c. 112, this term would have still subsisted. The term in this case has not been destroyed by any tenant in tail. Next, taking the whole context of this will, and looking at the pedigree, it cannot be contended successfully that the event has arisen on which the £5000 is to be raised; for there can be no doubt that "issue" means "children:" *Martin* v. *Holgate* (9); *Lanphier* v. *Buck* (10). The term in itself, if good in other respects, would not now be a good term, even assuming that the question of remoteness had not to be considered, and that no estate was now vested for the purpose of raising the £5000. It is therefore submitted that on these different grounds, and considering the broad principle laid down in *Case* v. *Drosier* (11), this demurrer must be allowed.

Mr. *C. Hall*, and Mr. *North*, for the Plaintiffs:—

This is a good trust, and the sum of £5000 is now raiseable. The Plaintiffs are the only two persons who, in the events that have happened, are entitled to take. The term is a perfectly good legal term. Where it is desired to provide for additional portions for daughters, it is usual to create a term after the estate tail, and then to declare the trusts. The question is, whether it is actually necessary, for the purpose of giving validity to a charge upon an estate, to have a separate and independent term limited immediately after the limitation of an estate tail, or whether there may

(1) 2 Sw. 432.
(2) 2 V. & B. 54.
(3) 14 Sim. 369.
(4) 17 Ibid. 187.
(5) 3 K. & J. 16.
(6) Vol. i. 5th Ed. pp. 202–203, n.
(7) 2 Keen, 689.
(8) Law Rep. 4 H. L. 43.
(9) Ibid. 1 H. L. 175.
(10) 2 Dr. & Sm. 484.
(11) 2 Keen, 764; 5 My. & Cr. 246.

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not be an express trust declared and limited of a term antecedent to the estate tail, so that it shall be equally effectual and operative—the charge itself being so limited that it never could have been raiseable if any preceding tenant in tail had barred the entail. The question here is one of intention, and the testator seems to have intended to avoid the error which was fallen into in *Case* v. *Drosier* (1). In *Eales* v. *Conn* (2) an estate was by deed limited to the husband for life, with remainder to trustees for 500 years, for raising portions for younger children, with remainder to the sons of the marriage in tail. There was issue a son and a daughter, who died an infant in her mother's lifetime. The son attained twenty-one, and suffered a recovery, but that did not defeat the charge. In this Court, in considering the validity or invalidity of the term, the intention must be looked at separately. This is a case in which the testator has carefully said that this sum of £5000 is only to be raised in case any one or more of the younger issue shall become entitled under the limitations. All tenants in tail have, on coming into possession, dominion over the estate; and the term being in the nature of a remainder after preceding limitations in tail, it was always capable of being destroyed: 3 & 4 Will. 4, c. 74, s. 15; and therefore is not open to the objection on the ground of perpetuity. The cases which have been cited to shew that destructibility is not a sufficient test are cases entirely of a special class and description; and those of *Peacocke* v. *Pares* (3) and *Collingwood* v. *Stanhope* (4) were cases of construction, and came within the same class. The question here is simply one of construction, to be taken in connection with and having regard to the special rules which this Court always applies and adopts in considering the language of instruments in reference to provisions for younger children. The case of *Martin* v. *Holgate* (5) is certainly not applicable, for here a great-grandson of the testator has come into possession, and there are objects to take—those objects being the testator's sons or their children; and so far as regards personal capacity, there can be no objection in point of law. The other cases cited have no application to the question before the Court. It is

(1) 2 Keen, 764; 5 My. & Cr. 246.
(2) 4 Sim. 65.
(3) 2 Keen, 689.
(4) Law Rep. 4 H. L. 43.
(5) Law Rep. 1 H. L. 175.

submitted that the sum of £5000 is clearly raiseable under the trusts of this term, and that the demurrer ought to be overruled.

[They also referred to *Fazakerly* v. *Ford* (1), *Caldwell* v. *Cresswell* (2), and *Harrison* v. *Round* (3).]

Mr. *Bristowe*, in reply, referred to *Davidson's* Precedents (4), and submitted that *Eales* v. *Conn* (5), so far as it was applicable, was in favour of the Defendant's contention; and that it was very difficult to distinguish the case from that of *Case* v. *Drosier* (6).

Nov. 10. SIR JOHN WICKENS, V.C.:—

It seems to me, on consideration, that this case is undistinguishable in principle from that of *Case* v. *Drosier*. That case is one of the highest authority, from the care with which it was argued, and the Judges by whom it was decided.

It may be observed that the construction assumed by both Judges as the true construction of the limitation there, and by virtue of which it becomes applicable here, has been since established as the correct one by the decision of the House of Lords in the case of *Baker* v. *Tucker* (7).

That being so, I ought not, I think, to go into the general question of principle, which, but for the decision in *Case* v. *Drosier*, might have been a very nice one; nor to seek to distinguish the present case from it on grounds which, if they had existed in it, would not, as I read the judgments of Lord *Langdale* and of Lord *Cottenham*, have altered their decisions. The demurrer must therefore be allowed.

Solicitors: Messrs. *Westall & Roberts*, agents for Messrs. *Thompson & Cook, Hull*; Messrs. *Evans & Foster*.

(1) 4 Sim. 390.
(2) Law Rep. 6 Ch. 278.
(3) 2 D. M. & G. 190.
(4) Vol. iii. p. 930, last Edition.
(5) 4 Sim. 65.
(6) 2 Keen, 764; 5 My. & Cr. 246.
(7) 3 H. L. C. 106.

V.-C. W.
1871
Nov. 6, 20.

HOLMES *v.* SYMONS.

[1871 H. 111.]

Transfer of Shares—Winding-up of Company—Creditors' Deed by Transferee—Liability to indemnify Transferor against Calls not proveable—Bankruptcy Act, 1861, *sects.* 153, 154—*Plea.*

After a transferor of shares in a limited company had executed the deed of transfer, but before the transferee had executed and registered it, the company was ordered to be wound up. About three months after the date of the winding-up order the transferee executed a deed of inspectorship under the 192nd section of the *Bankruptcy Act*, 1861, which was duly registered, and contained the usual stipulations for a release, and the name of the transferor was inserted in the accounts delivered to the Chief Registrar with the deed as a creditor for the purchase-money. The transferor had been placed on the list of contributories, and had paid calls. The transferee died, and the three Defendants were his legal personal representatives. The transferor filed a creditor's bill against the representatives of the transferee, praying a declaration that the transferee's estate was liable for the amonnt of the calls:—

Held, that the Plaintiff's claim could not have been proved under the deed, and a plea of the deed was consequently overruled.

THE Plaintiff, *John Holmes*, on his application, obtained from the directors of the *Contract Corporation, Limited*, an allotment of ten shares to himself and ten to *Robert White*. In December, 1863, Messrs. *Castello Brothers*, brokers, received instructions from the Plaintiff to sell all the shares, and they sold them to *Frederick Symons*, for the settling day, the 20th of February, 1864, for £200; but the Plaintiff and *White*, at the request of the brokers, agreed for value to allow the contract of sale to be carried over to future account days; and on the last of such days, viz., the 30th of March, 1864, the Plaintiff and *White* executed transfers, and delivered the shares to the brokers, and they, on the 3rd of April, 1864, delivered to the Plaintiff and to *White* an account of the prices of the shares, with the considerations for carrying over, less commission. *Frederick Symons* neglected to execute the transfers, and to have them registered at the office of the company. In April, 1866, the *Contract Corporation* was ordered to be wound up compulsorily, and the names of the Plaintiff and *White* were

placed on the list of contributories. A motion made on their behalf before the Master of the Rolls to have their names removed from such list was dismissed, but without costs as against *F. Symons.*

On the 11th of July, 1866, a deed, under sect. 192 of the *Bankruptcy Act*, 1861, was made between *F. Symons*, of the first part; two persons named (and called inspectors) of the second part; and the several persons, companies, and co-partnership firms who at the date were creditors of the debtor within the meaning of the 192nd and other sections of the Act, of the third part. The debtor, for himself, his heirs, executors, and administrators *inter alia*, covenanted with the inspectors that he, as regarded his estate, would forthwith make out a true account of all the estate, and all such particulars as might be sufficient to enable them to ascertain the actual state of the same, and also a true account of all debts and engagements . . . and that he would in all respects obey the orders of the inspectors in or about the estate, and execute all deeds as they should require, and wind up the estate under their control, and until dividends to the amount of 20*s.* in the pound should have been paid. It was agreed that the estate should be administered in accordance with the principles of the bankrupt law, or as near thereto as circumstances would permit . . . that each of the creditors, before becoming entitled to receive any dividend, should, if reasonably required by the inspectors, deliver to them a statement in writing, signed by such creditor, of his or her debt or claim, or the debt or claim of the person, company, or co-partnership in which he or she might be a partner, shareholder, or manager, with all the particulars necessary or usual on a proof in bankruptcy . . . and that, when the estate should have been fully administered, according to the provisions of the deed, to the satisfaction of the inspectors, they might certify the fact in writing under their hands, such writing to be indorsed upon or to refer to those presents; and thereupon and thenceforth those presents "shall operate and be a release and discharge to the debtor, his heirs, executors, and administrators, as fully and effectually, and in like manner, as an order of discharge granted to him under an adjudication of bankruptcy against him, and may be pleaded and used accordingly as a bar to, and in defence of, all actions, suits,

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and proceedings in respect of any of the debts, claims, and demands of all or any of the creditors." There was a provision in the deed that it was intended to be, and take effect as, a valid deed of inspectorship within the provisions of the *Bankruptcy Act*, 1861; and that it should be lawful for the inspectors to bring, take, and defend all such actions, suits, and other proceedings as might be necessary or expedient for the purpose of giving effect to those presents, and in defence of the debtor at the suit of the creditors who might take proceedings against them or him in respect of any debt included in, or who refused to be bound by, those presents; and another provision was as follows: "And whereas it is intended that these presents, and the provisions hereby made, shall be taken and accepted by the said creditors in lieu of, and substitution for, their several and respective debts, claims, or demands in respect whereof dividends will become payable under these presents; and whereas it is essential to the interests of the said creditors, and for the better realisation of the said estate, that the said debtor should not be harassed by any proceedings hereafter to be commenced or prosecuted by any of the said creditors in respect of any such debt, claim, or demand: now this indenture witnesseth, and it is hereby further agreed and declared, that if any of the said creditors shall, at any time hereafter whilst these presents are in force, commence or prosecute any action, suit, or other proceeding against the said debtor in respect of any such debt, claim, or demand as aforesaid, these presents and the provisions herein contained shall operate and have the same force and effect as an order of discharge which has taken effect under the *Bankruptcy Act*, 1861; and this declaration and agreement may be pleaded and used in bar of, or as a defence or answer to, every such action, suit, or other proceeding, in like manner and with the same effect as an order of discharge under the *Bankruptcy Act*, 1861, might be pleaded and used in case the said debtor had been adjudicated bankrupt on the day of the date of these presents, and the said debtor had obtained his order of discharge under such adjudication; but nevertheless this clause shall not prevent, nor operate so as to prevent, any of the said creditors who shall take any such action, suit, or proceeding as aforesaid from afterwards claiming, being entitled to, and receiving any dividend or dividends or

moneys set apart therefor, upon his, her, or their debt respectively, or any other benefit or advantage which assenting creditors may take under these presents or otherwise."

Frederick Symons, in his accounts delivered to the Chief Registrar with the deed, entered the names of the Plaintiff and of *White* as creditors for the aggregate sum of £200 as the amount of his liability on the shares. Neither the Plaintiff nor *White* executed nor assented to the deed. The Plaintiff had paid to the liquidator for calls, between the 24th of September, 1867, and the 25th of May, 1870, sums amounting to £970.

F. Symons died in August, 1870, intestate, and letters of administration of his estate were, in November, 1870, granted to the three Defendants, who, on an application to them for the purpose, refused to indemnify the Plaintiff against such payments.

The bill was filed in April, 1870, by *John Holmes*, on behalf of himself and all other creditors of *F. Symons*, against the three legal personal representatives, praying for a declaration that the estate of *F. Symons* was liable for the amount of the calls; for an account of what was due to the Plaintiff and all other creditors of the intestate in respect of their claims, and that his estate might be applied in payment of such claims; for a receiver, injunction, and accounts.

The Defendant *Walter Symons*, in June, 1871, filed a plea in bar to the bill against him and the other Defendants, and stated that the conditions necessary to make the deed of inspectorship of the 11th of July, 1866, binding on non-assenting creditors under the provisions of the *Bankruptcy Act*, 1861, were fulfilled; that the Plaintiff was, at the time of the making the deed, a creditor of *Frederick Symons* within the meaning of that Act, in respect of the claim sought to be established by the bill; and that all conditions were performed necessary to render the Plaintiff bound by the deed as if he had been a party thereto, and had executed the same. Then followed the usual averment that all the matters and things pleaded were true.

Mr. *Greene*, Q.C., and Mr. *Maidlow*, for the plea:—

It is the duty of the Defendants to contend that the Plaintiff was bound by the deed, which was put upon the footing of bank-

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ruptcy for all purposes. Was the Plaintiff a person who had a claim at the date of the deed which was proveable under it—or, in other words, in bankruptcy, if there had been an adjudication? The 153rd section of the *Bankruptcy Act*, 1861, enacts that, "if any bankrupt shall, at the time of adjudication, be liable, by reason of any contract or promise, to a demand in the nature of damages, which have not been, and cannot be, otherwise liquidated or ascertained, it shall be lawful for the Court, acting in prosecution of such bankruptcy, to direct such damages to be assessed by a jury, either before itself or in a Court of law, and to give all necessary directions for such purpose; and the amount of damage, when assessed, shall be proveable as if a debt due at the time of the bankruptcy, provided that, in case all necessary parties agree, the Court shall have power to assess such damages, without the intervention of a jury or a reference to a Court of law;" and sect. 154 enacts that, "if any bankrupt shall, at the time of adjudication, be liable, by reason of any contract or promise, to pay premiums upon any policy of insurance, or any other sums of money, whether yearly or otherwise, or to repay to or indemnify any person against any such payments, the person entitled to the benefit of such contract or promise may, if he think fit, apply to the Court to set a value upon his interest under such contract or promise; and the Court is hereby required to ascertain the value thereof, and to admit such person to prove the amount so ascertained, and to receive dividends thereon."

Full power was given to discover what damages (if any) were due to the Plaintiff. The *Contract Corporation* was a limited company, and the damages were unliquidated. The questions would have been, what amount has been paid upon the shares? and what would be recovered upon them? It was easy to find what the claim might have been. The plea is put in by the first-named Defendant, and he has pleaded the deed most effectually.

[Mr. *Dickinson*, Q.C.:—No release has been pleaded.]

The plea sets forth that all the conditions necessary to make the deed binding on the Plaintiff (who was a creditor) had been fulfilled, and it was not necessary to do more than to refer to the deed, which is sufficiently stated in the bill. Assuming that the

plea is good in point of form, it raises the question whether the Plaintiff can come to this Court and ask for the administration of the estate of the debtor. The Plaintiff was bound by the deed, which conveyed the debtor's estate for his benefit. Could the Plaintiff have proved his debt at the date of the deed? The winding-up order was in April, 1866, and the deed was executed in the following July, and therefore it was easy to discover the extent of the debtor's liability upon the shares: *Financial Corporation* v. *Lawrence* (1).

[The VICE-CHANCELLOR:—The Master of the Rolls has held that a winding-up is not *primâ facie* insolvency; but it seems to have been so considered in that case.]

The case is the converse of this, for here the deed was executed after the winding-up, and the extent of liability might have been determined: *Ex parte Kintrea* (2). That case was not protected by the deed, but this is. The 75th section of the *Companies Act*, 1862, is applicable to a contributory becoming bankrupt, so as to bring him within sects. 153 and 154 of the *Bankruptcy Act*, 1861; and, taking the two sections together, it is submitted that *F. Symons'* estate is only liable to indemnify the Plaintiff to an extent in damages which could be ascertained under the deed or in bankruptcy.

The remedy of the Plaintiff as against the estate of *Symons* being clearly under the deed, this suit has been improperly instituted, and therefore the plea ought to be allowed.

[They also referred to *Ex parte Wilmot* (3), *In re Penton* (4), *Parbury's Case* (5), and *McEwen's Case* (6).]

Mr. *Dickinson*, Q.C., and Mr. *E. Cutler*, for the bill:—

Any objection as to the form of the plea would probably only add to the costs, and therefore it is waived. This is a different case from any of those cited. It is not a demand of a company against a shareholder; if it were, it might be contended, that as the shareholder had covenanted to pay so much a share, there might have been proof in bankruptcy for so much as remained

(1) Law Rep. 4 C. P. 731–738.
(2) Ibid. 5 Ch. 95.
(3) Ibid. 2 Ch. 795.
(4) Law Rep. 1 Ch. 158.
(5) 3 D. F. & J. 80.
(6) Law Rep. 6 Ch. 582.

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unpaid. There is statutable authority for that in the *Companies Act*, 1862, s. 75.

Financial Corporation v. *Lawrence* (1) is an authority in the Plaintiff's favour. *Warburg* v. *Tucker* (2) was decided before the *Bankruptcy Act*, 1861; it had reference to the contingencies to be calculated, and, as it was considered to be a hard case, the 154th section of that Act was passed for the purpose of remedying the inconvenience. If a creditor asks to have the benefit of the 154th section, he gets that which is distributable, but he loses the power of resorting to after-acquired estate. The section is applicable only in cases where the parties "think fit" to apply to the Court. It does not give the same authority to the Court as is given by the 153rd section: *In re Penton* (3).

A deed under the 192nd section of the *Bankruptcy Act*, 1861, does not bind one who has a claim for unliquidated damages against the debtor, and whose damages have not been assessed under the 153rd section: *Robertson* v. *Goss* (4).

The 153rd section is limited to cases where there is a cause of action actually accrued: *Ex parte Mendel* (5).

Where the 154th section is applicable, it rests in the option of the creditor; and if he think fit to assert his rights *aliunde*, he can do so, and a plea will be no answer to his demand. The section does not apply to deeds under the Act of 1861, but only to bankruptcies. But there must be an express promise to indemnify. The words "contract and promise" are used in both sections: *Johnson* v. *Skafte* (6).

In the case of *Martin's Patent Anchor Company* v. *Morton* (7) there was a decision on the 154th section; and *Blackburn*, J. (8), said the section "clearly contemplated only a contract to make periodical payments ascertained at the time of the contract," and not to calls; it does not say that a bankrupt shall be discharged from his liability to pay future calls. And *Cary* v. *Dawson* (9) is *ejusdem generis*. In *Mudge* v. *Rowan* (10) there was a deed of separation, and the husband covenanted to pay an annuity to his

(1) Law Rep. 4 C. P. 731.
(2) 5 E. & B. 384.
(3) Law Rep. 1 Ch. 158.
(4) Ibid. 2 Ex. 396.
(5) 1 D. J. & S. 330.
(6) Law Rep. 4 Q. B. 700.
(7) Ibid. 3 Q. B. 306.
(8) Ibid. 312.
(9) Ibid. 4 Q. B. 568.
(10) Ibid. 3 Ex. 85.

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wife quarterly, and that was not a liability under the 154th section. A plea like this is no answer to an action where the claim is for unliquidated damages which have not been assessed under the 153rd section: *Sharland* v. *Spence* (1); and, under all the circumstances, it is submitted that *F. Symons* was not released by the deed, and that the plea ought to be overruled.

Mr. *Greene*, in reply:—

In *Ex parte Pickering* (2) the present Lord Chancellor said (3): "While the concern is a going concern the amount of liability to future calls is incapable of being estimated; but when the company is being wound up, this state of things is altered, and the contributory is a debtor for an amount which the Legislature assumes to be capable of being estimated."

That case was followed by the learned Judges of the Court of Common Pleas in *Financial Corporation* v. *Lawrence* (4). The 153rd section of the *Bankruptcy Act*, 1861, is solely for the purpose of ascertaining whether damages are liquidated or not. The deed in this case must be taken to be a good and valid one. The simple question is, whether this was a proveable debt, and if it was, all proceedings at law were barred by the deed. If it should be considered that the deed was not effectual in covering such a demand as this, then such deeds will in future be quite useless. The object of all parties, as the purport of the deed shews, was that the whole body of creditors should come in under and be bound by it, and that the debtor should be free from all debts as from the date of it. The cases of *Robertson* v. *Goss* (5) and *Ex parte Mendel* (6) have no bearing upon this, as there the creditors had an option; and in the other cases cited the windings-up followed the bankruptcies; the damages were unliquidated; and, therefore, it was considered that the debtors were not discharged. Further, there was no express contract; but here that which took place on the 3rd of April, 1864, amounted to an express contract, according to the rules of the *Stock Exchange*, which required *F. Symons* to receive and pay for the shares, and it was clearly within

(1) Law Rep. 2 C. P. 456.
(2) Ibid. 4 Ch. 58.
(3) Ibid. 61.
(4) Law Rep. 4 C. P. 731.
(5) Ibid. 2 Ex. 396.
(6) 1 D. J. & S. 330.

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the 153rd and 154th sections of the Act. I admit, that if the question were independent of the *Companies Act*, 1862, the debt would not be proveable under the 154th section; but considering that there was a winding-up order under the Act of 1862, the effect of it was to make the debt proveable under the *Bankruptcy Act*, 1861.

[The VICE-CHANCELLOR:—Suppose it were a case of suretyship?]

Before the Act of 1862 there was the case of *Rice* v. *Gordon* (1); but I am not aware of any decision of that kind since that Act. I maintain that the debt was proveable, and I rely upon the 154th section of the Act of 1861, which constituted the calls a debt. It may be considered as the debt of a surety, and in Equity a surety is bound just as much as if he executed the deed. The bill states the liability of *F. Symons*, and I admit it. If he had been a shareholder, he would have been, under the 75th section of the Act of 1862, liable to pay all calls; and though he was not a shareholder, he had expressly undertaken to indemnify the Plaintiff, and he was bound to do so.

[The VICE-CHANCELLOR:—Does a transferee undertake to indemnify the transferor?]

If it be not expressly stated in the deed of transfer, still the transferee is equally bound to do so. The contract is involved in taking the shares, and the indemnity results as if there were express words, and the contract is brought within the 154th section. I submit, therefore, that the plea ought to be allowed.

Nov. 20. SIR JOHN WICKENS, V.C.:—

This is a creditor's suit by a transferor of shares in the *Contract Corporation, Limited*, now in liquidation, who, by the default of the transferee to register the transfer, has been placed on the list of contributories and compelled to pay calls. The transferee has since died intestate, and the Defendants are his administrators. The defence, raised by plea, is founded on a composition deed

(1) 11 Beav. 265.

executed by the transferee about three months after the order for winding up the company. All objections to the form of the plea were waived at the Bar, and the question was argued on its merits That question is, whether the composition deed bars the claim. If it does so, as was admitted at the Bar, it must be by virtue of sect. 153, or of sect. 154, of the *Bankruptcy Act*, 1861. Sect. 153, which gives a right of proof in respect of unliquidated damages, does not, in my judgment, assist the Defendant's case. Even supposing that, under a deed like the present, there is a right to prove for unliquidated damages (which is contrary to the case of *Ex parte Wilmot* (1)), and that this is a liability on a contract or promise (which is, it was argued, opposed to the case of *Johnson* v. *Skafte* (2)), sect. 153 seems intended to correct one defect only, viz., that arising from the non-liquidation of damages; and for that view the case of *Cary* v. *Dawson* (3) is an authority. But here there was no damage at the date of the deed. Sect. 154 gives a right of proof where the bankrupt at the time of adjudication is liable in respect of any contract or promise to pay premiums upon any policy of insurance, or any other sums of money, whether yearly or otherwise, or to repay to or indemnify any person against any such payment. Even assuming that there is a contract or promise here, I think it clear, on the authorities of *Cary* v. *Dawson*, *Mudge* v. *Rowan* (4), and *Martin's Patent Anchor Company* v. *Morton* (5), that the sums payable under it are not such sums of money as are mentioned in this section, and, consequently, that the liability to indemnify the Plaintiff against them is not such a liability to indemnify as is there mentioned. No doubt sect. 77 of the *Companies Act*, 1862, enacts that, if any contributory becomes bankrupt, his assignees shall be deemed to represent him for the purposes of the winding-up, and may be called upon to admit to proof against his estate any moneys due from the bankrupt in respect of his liability to contribute to the assets of the company being wound up. But this is a special right first given by the section, and does not in terms—nor, it seems, in spirit—extend to a proof against the estate of a transferee who has

(1) Law Rep. 2 Ch. 795, 799.
(2) Ibid. 4 Q. B. 700.
(3) Law Rep. 4 Q. B. 568–572.
(4) Ibid. 3 Ex. 85.
(5) Law Rep. 3 Q. B. 306–312.

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allowed the liability of shares to fall on the transferor. It follows that there was no right of proof, and consequently no bar of the Plaintiff's debt; and the plea must be overruled, but the costs will be costs in the cause.

Solicitors for the Plaintiff: Messrs. *J. & R. Gole.*
Solicitor for the Defendants: Mr. *H. J. Godden.*

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ASHTON *v.* CORRIGAN.

[1871 A. 10.]

Agreement to execute Mortgage—Specific Performance.

Where the Defendant had agreed to execute to the Plaintiff a mortgage of certain leasehold premises in the usual form, containing an absolute power of sale, in consideration of money due, and had, when requested to do so, failed to execute such mortgage:—

The Court made a decree for specific performance.

THIS bill was filed for the purpose of compelling the Defendant to execute a mortgage to the Plaintiff of certain leasehold premises pursuant to an agreement dated the 20th of August, 1870, by which the Defendant, in consideration of a sum of money then due from him to the Plaintiff, charged certain long leasehold premises with the repayment of that sum and interest, and agreed that he (the Defendant), his executors, administrators, or assigns, would at any time thereafter, at the request of the Plaintiff, his executors, administrators, or assigns, at his own cost, execute to him or them a mortgage of the premises in the usual form, containing an absolute power of sale, and all the usual trusts, powers, and covenants, subject to all prior charges. The Defendant was called upon to execute a mortgage, but he failed to keep an appointment for that purpose, and he had returned no answer to the communications which had been addressed to him on the subject.

Mr. *Cadman Jones*, for the Plaintiff, asked for a decree, and

See Hermann v. Hodges, 7 R. 16 Eq. 18. L. C. for the R.

referred to *Jones* v. *Greatwood* and *Fraser* v. *Thomas*, referred to in *Seton* on Decrees (1).

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An appearance had been entered for the Defendant, but no one appeared for him in court.

SIR JOHN WICKENS, V.C.:—

I doubt whether a contract to execute a mortgage, which the mortgagee may enforce by a sale the day after its execution, is one which the Court will specifically perform; and I know of no reported case in which such relief has been given where the right to it has been contested. However, on the authority of the cases cited from *Seton* on Decrees, I will make the decree.

Solicitors: Messrs. *Robinson & Preston.*

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[1871 L. 146.]

Partners—Appearance—Substituted Service.

In a suit against five partners, three of whom had entered appearance and the other two were out of the jurisdiction and had not, substituted service of a notice of motion for an injunction, and for the appointment of a receiver on any of the three partners for the two, was allowed.

THE Defendants, five in number, were bankers carrying on business in partnership, in *Lombard Street*, and the suit had reference to deeds deposited at the bank; the question being whether they were left with the Defendants for safe custody, or to secure the repayment of moneys advanced.

Three of the Defendants had entered appearance, and the other two, who were out of the jurisdiction, had not.

Mr. *Ingle Joyce*, for the Plaintiff, said it was intended to move, on the next motion day, for an injunction, and for the appointment of a receiver; and asked for leave to serve the bill with a notice

(1) 3rd Ed. 448, 443.

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of motion upon any of those partners who had appeared to the bill.

He referred to *Carrington* v. *Cantillon* (1), *Coles* v. *Gurney* (2), *Kinder* v. *Forbes* (3), and *Morgan's* Orders (4).

SIR J. WICKENS, V.C., gave leave for substituted service.

Solicitor: Mr. *John Frost.*

(1) Bun. 107.
(2) 1 Madd. 187.
(3) 2 Beav. 503.
(4) 4th Ed. p. 420.

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July 24, 25, 26, 27, 28; *Aug.* 2, 4; *Nov.* 6.

[1868 P. 52.]

Company—Prospectus—Concealment of Material Fact—Liability of Directors—Rights of Allottee of Shares—Rights of Transferee—Delay.

Directors of a company issuing a prospectus are bound to disclose every material fact; and if they do not they will be held liable to indemnify any person who takes shares from the company on the faith of the prospectus against any loss which may be occasioned to him by reason of such concealment, even although they may have believed that the concealment will be beneficial to the persons induced to take shares.

A fact which, if disclosed would have so discredited the company as to prevent its formation, is a material fact within the meaning of the foregoing proposition.

The estate of a deceased director is liable in equity in respect of such indemnity to the same extent as the director would have been if living.

A transferee of shares has no greater right to be indemnified by the directors in respect of their misconduct in issuing a prospectus than the original allottee would have had; and if the allottee would have been debarred of his remedy against the directors by laches, condonation, or otherwise, the transferee is also debarred of remedy.

Any person seeking relief against directors of a company in respect of misconduct in issuing a prospectus is bound to come promptly for relief.

In July, 1865, the directors of a company formed to take over the business of a firm which they knew to be insolvent, issued a prospectus in which the fact of such insolvency was withheld from the public. If the fact had been disclosed the company would not have been formed. The directors withheld the fact, honestly believing that the speculation on which they were about to embark would be successful.

In October and December, 1865, the Plaintiff, on the faith of the prospectus, bought in the market shares which had originally been allotted to a partner in the insolvent firm. In May, 1866, the company stopped payment, and was afterwards wound up, and the Plaintiff after considerable litigation was settled on the list of contributories, and was compelled to pay large sums in respect of calls. In March, 1868, the Plaintiff filed the bill in this suit, seeking to be indemnified in respect of his losses by the surviving directors, and the estate of a deceased director:—

Held, that if he had been an original allottee and had come in due time, he would have been entitled to such indemnity; but that he was debarred of his remedy on the ground, first, that he was in no better position than the allottee from whom he bought, and, secondly, that he had come too late for relief.

FOR many years previously to 1865, a firm of bill brokers and money dealers carried on business in the City of *London* under the

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style of *Overend, Gurney, & Co.* The business so carried on was probably the largest of its kind in the commercial world, and the firm had a very high and widespread reputation. Three-fourths of the business was owned by certain persons known as the *London* partners; the remaining fourth was owned by certain persons known as the *Norfolk* partners, being in fact the partners in a banking business carried on at *Norwich* and elsewhere in *Norfolk*.

In 1865 the *London* partners were *Samuel Gurney, Henry Edmund Gurney, David Ward Chapman,* and *Robert Birkbeck;* and the *Norfolk* partners were *Daniel Gurney;* the said *Samuel Gurney* and *Henry Edmund Gurney; John Henry Gurney, Francis Hay Gurney, Henry Birkbeck, William Birkbeck, Charles Henry Gurney,* and *Somerville Arthur Gurney.*

It now appeared that this firm, notwithstanding its reputation, had in the years subsequent to 1857 sustained great losses. These did not arise from any diminution in the money-earning power of the legitimate business of the firm, but were mainly occasioned by large advances being made on insufficient security to firms and companies engaged in business of a speculative and hazardous description. In 1865 these losses occasioned serious anxiety to the partners, and led them to desire the introduction of fresh capital into the firm. For this purpose, they in the first instance made applications to their relations, many of whom were wealthy, and had large sums of money at their disposal; but ultimately it was seen that the amount required was too great for the resources of the private friends of the partners.

Four gentlemen, named *Henry Ford Barclay, Thomas Augustus Gibbs, Harry George Gordon,* and *William Rennie,* all of whom were of high standing in the City of *London,* were then consulted, and the affairs of the firm were fully disclosed to them; and it was determined to form a joint stock company for the purpose of taking over and carrying on the business of the firm. Accordingly, on the 12th of July, 1865, a joint stock company, named *Overend, Gurney, & Co., Limited,* was duly registered under the *Companies Act,* 1862, with a capital of £5,000,000, divided into 100,000 shares of £50 each. The memorandum of association of the company provided as follows:—

"3rd. The objects for which the company is established are the

receiving of money on deposit, or by re-discount of bills, and the employment and investment of such money and of the paid-up capital of the company in the discounting of bills of exchange, promissory notes, and other negotiable securities, and in making advances on loan and investing in securities, and generally the carrying on of the business of bill brokers and money dealers, as heretofore carried on by Messrs. *Overend, Gurney, & Co.*, at No. 65, *Lombard Street*, in the City of *London*, and with a view to the above objects the acquisition of such business upon terms to be agreed by the directors, and the acquisition, whether by way of purchase or amalgamation or otherwise, of such other business or businesses of a like character, and upon such terms, as the directors shall think expedient, and the doing of all acts and things incidental or conducive to the attainment of the above objects."

The articles of association contained the following clause:—

"84. The directors are also authorised to purchase or acquire, upon such terms and under such stipulations as to guarantee or otherwise as may be agreed upon, the business and goodwill of the said Messrs. *Overend, Gurney, & Co.*, as the same now stands, and any other business of a like character which they may hereafter think it expedient to acquire for the benefit of the company."

On the same day a prospectus of the company was issued, stating amongst other things that the directors of the company were *Henry Edmund Gurney, John Henry Gurney, Robert Birkbeck, Henry Ford Barclay, Thomas A. Gibb, Harry G. Gordon*, and *William Rennie;* and also stating as follows:—

"The company is formed for the purpose of carrying into effect an arrangement which has been made for the purchase from Messrs. *Overend, Gurney & Co.*, of their long established business as bill brokers and money dealers, and of the premises in which the business is conducted; the consideration for the goodwill being £500,000, one-half being paid in cash and the remainder in shares of the company, with £15 per share credited thereon: terms which, in the opinion of the directors, cannot fail to ensure a highly remunerative return to the shareholders.

"The business will be handed over to the new company on the

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1st of August next; the vendors guaranteeing the company against any loss on the assets and liabilities transferred.

"Three of the members of the present firm have consented to join the board of the new company, in which they will also retain a large pecuniary interest. Two of them (Mr. *Henry Edmund Gurney* and Mr. *Robert Birkbeck*) will also occupy the position of managing directors, and undertake the general conduct of the business.

"The ordinary business of the company will, under this arrangement, be carried on as heretofore, with the advantage of the co-operation of the board of directors, who also propose to retain the valuable services of the existing staff of the present establishment.

"The directors will give their zealous attention to the cultivation of the business of a first class character only, it being their conviction that they will thus most effectually promote the prosperity of the company and the permanent interests of the shareholders.

"Copies of the company's memorandum and articles of association, as well as of the deed of covenant in relation to the transfer of the business, can be inspected at the offices of the solicitors of the company.

"Applications for shares must be accompanied by the payment of a deposit of £2 per share, which will be received by Messrs. *Barclay, Bevan, Tritton, Twells, & Company*, 54, *Lombard Street*. In the event of no allotment being made, the deposit will be returned in full; should a less number of shares be allotted than are applied for, the deposit will, so far as required, be appropriated towards the payment due upon allotment."

At the time when the prospectus was issued no statement of accounts had been prepared; but the liabilities of the firm on the 31st of July, 1865, as stated in a balance sheet entered in the books of the firm, amounted to £15,281,641 17*s.* 10*d.*, including a balance of £1,053,715 1*s.* 3*d.* due to the partners on their private accounts, but not including liabilities in respect of bills rediscounted, bills payable or credits granted, and guarantees. The assets, as stated in the same balance sheet, appeared of equal amount, but included a sum of £4,213,896 16*s.* 4*d.*, under the

head "Suspense and Guarantee Account." This sum was the amount of debts due from the speculative firms and companies already mentioned, in respect of the advances made to them, against which securities of the estimated value of £1,082,000 only were held by the firm. Deducting from the amount of the suspense and guarantee account the balance due to the partners and the estimated value of the securities, the firm appeared on this statement to be insolvent to the extent of £2,078,181 15*s.* 1*d.*; but the partners had private estates valued at £1,257,000, and also an interest in the *Norwich Bank* and the goodwill thereof, valued at £1,067,000, and, taking these into account, they considered that the firm was not only solvent, but that there remained a considerable surplus in favour of the partners, exclusive of the £500,000 agreed to be given for the goodwill of the firm.

The transfer of the business by the firm to the company was carried into effect by two deeds, both dated the 27th of July, 1865. The first of these deeds was that above mentioned in the prospectus, and was made between the *London* partners of the first part, the *Norfolk* partners of the second part, and the limited company of the third part. It provided for the sale and purchase of the business as a going concern, to take effect at midnight on the 31st of July, 1865, at the price of £500,000—one half to be paid or allowed on account in cash, and the other half to be paid or treated as paid by the issue of 16,666 shares of £50 each, with £15 paid up; which sum was, so far as the directors of the company might require, to be applied and made available by way of material guarantee in aid of the covenants of the parties of the first and second parts therein contained, and the obligation of the company to pay and allow on account; such sum was to be controlled by the right to have the same so applied and made available, and was not to be enforced except in subordination to such right of the company. It also provided that the company should continue and carry on all open or unsettled accounts connected with the business, except such accounts as the directors might require to be reserved or accepted and wound up by the firm as thereinafter provided. It contained a guarantee by the parties of the first and second parts that, irrespective of any value to be attributed to the goodwill of the business, the assets which the company should have

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and take the benefit of on the day of completion should produce a net amount of money equal to or exceeding the aggregate amount of moneys which the company might have to pay or provide, or should pay or provide, in satisfaction and discharge of the obligations and liabilities of the firm. It provided that it should be obligatory on some one of the parties of the first and second parts to continue to act under the style of *Overend, Gurney, & Co.*, for the purpose of winding up any outstanding accounts of the firm which the directors of the company should consent or deem it desirable or expedient to be so wound up; and that no property of any description applicable to such accounts should be transferred to the company, but should be retained by the firm, and applied and disposed of by them for the purpose of winding up such accounts. There were provisions for the sale of the business premises of the firm to the company at a price to be ascertained by valuation; and it was stipulated that such price should be made available as and by way of material guarantee for the protection of the company, in the same way as thereinbefore provided with respect to the £500,000.

The second of the deeds was made between the same parties, and had reference mainly to the winding up by the firm of certain accounts specified in the schedule thereto. It provided that a separate account, to be called "*Overend, Gurney, & Co.'s* Suspense and Guarantee Account," should be opened on the day of completion in the books of the limited company, and that such account should be debited with the total amount of the balances which, as struck on the midnight of the 31st of July, 1865, should appear to the debit of the accounts in the schedule; and that such sum should be treated as due to the company from the firm upon an account stated between them and to be liquidated in account current as thereby provided; and the same account was to be credited with £250,000, being one moiety of the price of the goodwill, with the price of the business premises of the firm, and the total balance due to the partners on their private accounts. Then followed provisions as to the mode in which the accounts in the schedule were to be wound up by the firm, and the moneys received by them accounted for to the company. The account was to be closed and balanced on the 31st of December, 1868; if the balance was on the

credit side of the account the amount thereof was to be paid by the company to the members of the firm within a month; if the balance was on the debit side, the amount thereof was to be deemed a debt due to the company, and to be paid by the members of the firm, but at what time was not specified. It was stipulated that the company should have a lien on the 16,666 shares to be issued in payment of a moiety of the value of the goodwill, and on all property retained by the firm to be applied in winding up the said accounts; and such lien was to be for the purpose of securing to the company the performance, observance, and fulfilment of the covenants and obligations contained in either deed on the part of the members of the firm, and for protecting and indemnifying the company against any loss or damage to be sustained by the non-performance or non-observance thereof; and the company were to be entitled to have the said shares and property made available through the medium of a sale or otherwise, in order to secure the performance, observance, and fulfilment of such covenants and obligations, and for protecting and indemnifying the company as aforesaid.

The schedule included the following accounts: 1. All accounts between the firm and the *Millwall Iron Works Ship Building Company*, and between the firm and any persons in respect of shares owned by or hypothecated to the firm. 2. All accounts between the firm and any company, firm, partnership, or individual whose affairs were being wound up in bankruptcy, or under the *Companies Act*, 1862, or under any arrangement for the benefit of creditors. 3. All accounts between the firm and any other party in respect of advances, loans, or investments made in or upon the shares, debentures, stock, or property of any company incorporated or unincorporated which had been or was in the course of being dissolved and wound up. 4. All accounts which should be open in the books of the firm in respect of any unrealized property, or securities accepted or taken by the firm in satisfaction or settlement of any account which had theretofore been open or subsisting or unsettled between the firm and any other person or persons whomsoever.

The company commenced business on the 1st of August, 1865. Applications for shares were received very much in excess of the

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number of shares to be allotted, and all the shares were duly allotted.

About the 12th of August, 1865, application was made to the committee of the *Stock Exchange* for the appointment of a settling day in the shares of the company. On the occasion of this application the first of the two deeds, dated the 25th of July, was alone produced to the committee, and no mention was made of the existence of the other deed. The application was granted, but, as was deposed by the secretary of the *Stock Exchange*, on the presumption that all deeds relating to the transfer of the business had been produced.

The Plaintiff in this suit received a copy of the prospectus of the company soon after the issue thereof. At that time he had no money in his hands for which he required an immediate investment, and he did not apply for allotment of shares; but he kept the prospectus by him, and subsequently, having received large sums which he wished to invest, he, in October, 1865, purchased in the market 1000 shares in the company at £7 10*s.* premium, and again in December, 1865, purchased in the market a like number of shares at £6 10*s.* premium. The shares so purchased were transferred to him by deeds dated the 2nd of November, 1865, and the 3rd of January, 1866.

It appeared in the course of the proceedings in the suit that a very large number, if not the whole, of the shares in question had originally been allotted to *Samuel Gurney*, one of the partners in the firm, and had been by him transferred into the name of his broker, and had been sold by his directions, and that the purchase-money had been carried to the credit of the "Suspense and Guarantee Account," in accordance with the provisions of the second deed.

The company stopped payment on the 10th of May, 1866. On the 11th of June following, a resolution was passed that the company should be wound up voluntarily under the supervision of the Court; and on the 22nd of that month the usual order for winding up under supervision was made. After considerable litigation, the Plaintiff's name was settled on the list of contributories in respect of the 2000 shares held by him (1), and he had since paid

(1) Law Rep. 3 Eq. 576; Ibid. 2 H. L. 325.

all calls made in respect thereof. In the course of the winding-up all the debts of the company had been paid.

Thomas Augustus Gibb, one of the directors, died in November, 1866.

The bill in this suit was originally filed in 1868, and was afterwards amended; and, as amended, was against *John Henry Gurney, Henry Edmund Gurney, Robert Birkbeck, Henry Ford Barclay, Harry George Gordon*, the executors of *Thomas Augustus Gibb, Overend, Gurney, & Co., Limited*, and the liquidators thereof, as Defendants. It contained allegations (amongst others) to the effect that no proper investigation was made by the directors into the affairs of the firm; that the balance sheet already mentioned was imperfect and delusive, omitting, as it did, all reference to the liability of the firm on bills rediscounted, bills payable on credits granted, and guarantees, amounting to upwards of £8,000,000, of which a considerable part had ripened into claims; that the estimate of £1,082,000 as the value of the securities for the amount of the suspense and guarantee account was excessive; that the firm was in fact insolvent, and that such insolvency was well known to the partners therein and all the directors of the company; that the second of the two deeds was purposely kept from the knowledge of every one but the directors, in order to conceal the nature of the arrangement between the firm and the company and the state and value of the business; that the guarantees contained in the deed were illusory, inasmuch as the private estates of the members of the firm were wholly inadequate to afford anything like security against the liabilities of the firm, and were in fact insolvent to the knowledge of the directors; that if the Plaintiff had known the close connection between the firm and the *Millwall Iron Works Company* (mentioned in the second of the two deeds), and another company, called the *Atlantic and Royal Mail Steam Packet Company*, to which the firm had advanced large sums, he would not have purchased any shares; that the directors were guilty of a gross neglect of duty in not making an independent investigation into the affairs of the firm, and above all, in not disclosing fully and fairly to the public the information which they actually obtained; that the prospectus was issued for the purpose of falsely and fraudulently misrepresenting the state of the business

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and inducing the public to believe that they would become partners in a profitable business if they became shareholders therein; and that the only object of the promoters of the company was to prevent, if possible, by means of the shareholders' money, the stoppage and ruin of the old firm. It charged that, subject to the claims of the creditors of the company, the Plaintiff was entitled to rescind and avoid the contracts of membership entered into by him and to be indemnified by the Defendants (other than the liquidators) against all sums which he had paid or might be called on to pay to the company or the liquidators thereof.

It prayed for the following declarations: 1. That the statements put forward by the directors of the company in the prospectus and in pursuance of their alleged scheme, were so put forward with a view to deceive and mislead the public, and the Plaintiff as one of the public, and that the same contained several misrepresentations and suppressed several important facts which ought to have been made known to the public, and that the Plaintiff was misled and deceived by such misrepresentations, and induced by them and the omissions of the said important facts to purchase the shares so purchased by him in the company; and that the Plaintiff was therefore entitled to have the sales and purchases of the said shares set aside and rescinded so far as the same constituted the Plaintiff, or created a contract on his part to become, a shareholder and member of the Defendant company, subject and without prejudice to the rights of the creditors of the said company. 2. That the directors of the company neglected to discharge the duties which they took upon themselves when they assumed to act as purchasers of the said business on behalf of the shareholders in the said company. 3. That the Defendants, *John Henry Gurney, Henry Edmund Gurney, Robert Birkbeck, Henry Ford Barclay, William Rennie, Harry George Gordon,* and the estate of the said *Thomas Augustus Gibb,* were jointly and severally liable to make good to the Plaintiff or indemnify him against the loss which he had sustained and might sustain in consequence of his having become a member of the Defendant company. 4. That the Plaintiff was entitled to have the equities between himself and the Defendants, *John Henry Gurney, Henry Edmund Gurney, Robert Birkbeck, Henry Ford Barclay, William*

Rennie, Harry George Gordon, and the estate of *Thomas Augustus Gibb,* adjusted; and that the Defendants, the liquidators, ought not to have made any calls or to make any further calls upon the Plaintiff for payment of the debts of the Defendant company without having first exhausted, or until they had exhausted, the liability of the said *John Henry Gurney, Henry Edmund Gurney, Robert Birkbeck, Henry Ford Barclay, Harry George Gordon,* and *William Rennie,* and the estate of the said *Thomas Augustus Gibb.* 5. That as between the Plaintiff and the Defendants, *John Henry Gurney, Henry Edmund Gurney, Robert Birkbeck, Henry Ford Barclay, William Rennie, Harry George Gordon,* and the executors of *Thomas Augustus Gibb,* the said Defendants were primarily liable to pay the debts of the creditors of the said company. It then went on to pray for the proper relief, for the purpose of giving due effect to the preceding declarations, or such of them as the Court should think the Plaintiff entitled to, including an injunction to restrain the liquidators from making or enforcing any further calls upon or against the Plaintiff, as a contributory of the Defendant company, until the liability of the directors should have been exhausted in payment of the debts and liabilities of the company; and delivery up and cancellation of the transfer deeds executed by the Plaintiff, and the removal of the name of the Plaintiff from the list of members and contributories of the company, without prejudice to the Plaintiff's liability to the creditors of the company, in case the remaining contributories of the company should prove to be unable to pay in full the debts of such company.

The Defendants all insisted that the company had been formed in perfect good faith, and not in pursuance of any such fraudulent scheme as alleged in the bill; and they much relied on the facts (which were proved in the cause), that each of the directors had become a shareholder to a considerable amount, and had held his shares to the last; that some of them had induced their near relations to become and continue shareholders; and that others had deposited large sums with the company without taking any security, and that such sums had remained on deposit at the time of the stoppage.

With respect to the alleged fraudulent suppression of the second

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deed, it was shewn that instructions were given by the solicitor of the company to counsel simply to prepare and settle the necessary deed of transfer; that the preparation of two deeds was the result of a suggestion of counsel to that effect; that Messrs. *Gordon* and *Rennie* required the deeds to be settled by independent counsel on their behalf; that in consequence of the counsel engaged in the preparation of the deeds having other engagements they were able to settle the first of the two only previously to the issue of the prospectus, and that they were unable to settle the other until the 24th of July. They submitted that the preparation of two deeds was a matter with which the directors could not under the circumstances properly interfere. They alleged that the second deed was believed by the directors to be merely part of the machinery by which the guarantee contained in the first deed was to be carried out; and they submitted that they were under these circumstances under no obligation to disclose its existence. They denied that it was concealed or withheld with any fraudulent purpose.

The Defendant, *Henry Ford Barclay*, in addition to the defences set up by the other surviving directors, relied on the fact that he had nothing whatever to do with the preparation or publication of the prospectus. It appeared that in July, 1865, application was made to him to become a director of the company, and that he consented to act as such, but upon condition that he should not be required to attend to or take part in the formation or promotion of the company, or to perform any duties with reference to the affairs thereof, until his return from a voyage on which he was about to set out. Accordingly he took no part in the formation of the company, but on the evening of the 13th of July he received a bundle of the prospectuses, which had been issued on the previous day, with forms of applications for shares, and filled up these forms on behalf of his mother and two of his children. He embarked on his voyage on the following day, and did not return to *England* until the 5th of August, 1870, and it was not until after that date that he entered on his duties as director.

The executors of *Thomas Augustus Gibb*, by their answer, set up, by way of defence, the fact that the injury or wrong complained of by the bill was not committed within six calendar months before

the death of their testator, and they insisted that no action or suit could be maintained against them in respect thereof, and claimed the benefit of the statute 3 & 4 Will. 4, c. 42.

It appeared that Mr. *Peek* never examined the first deed, although it was open to the inspection of the public, nor instituted any investigation into the affairs of the company previously to the failure thereof.

Subsequently to the institution of this suit the surviving directors were indicted, and were tried before the Lord Chief Justice of *England*, in December, 1869. The indictment contained (amongst others) counts framed on the statute 24 & 25 Vict. c. 96, s. 84, which provides as follows: "Whosoever, being a director, manager, or public officer of any body corporate or public company, shall make, circulate, or publish, or concur in making, circulating, or publishing, any written statement or account which he shall know to be false in any material particular, with intent to deceive or defraud any member, shareholder, or creditor of such body corporate or public company, or with intent to induce any person to become a shareholder or partner therein, or to intrust or advance any property to such body corporate or public company, or to enter into any security for the benefit thereof, shall be guilty of a misdemeanor." The Defendants were acquitted (1).

Mr. *Kay*, Q.C., Mr. *Swanston*, Q.C., and Mr. *Jolliffe*, for the Plaintiff:—

The duties of persons who issue a prospectus are thus laid down by Vice-Chancellor *Kindersley*, in *New Brunswick and Canada Railway Company* v. *Muggeridge* (2): "Those who issue a prospectus, holding out to the public the great advantages which will accrue to persons who will take shares in a proposed undertaking, and inviting them to take shares on the faith of the representations therein contained, are bound to state everything with strict and scrupulous accuracy, and not only to abstain from stating as fact that which is not so, but to omit no one fact within their

(1) A special report of the proceedings at the trial, including the summing up of the Lord Chief Justice, has been published by Mr. *W. F. Finlason*, and is hereafter cited as "*Reg.* v. *Gurney*, *Finlason's* Report."

(2) 1 Dr. & Sm. 363, 381.

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knowledge the existence of which might in any degree affect the nature, or extent, or quality of the privileges and advantages which the prospectus holds out as inducements to take shares." This passage has since been cited with approbation by Lord *Chelmsford*, in *Central Railway Company of Venezuela* v. *Kisch* (1), and the present Lord Chancellor, in *Henderson* v. *Lacon* (2). We say that the directors did not fulfil these duties: that they, with full knowledge that the firm was insolvent, concealed the fact in the prospectus issued by them; and that, whether such concealment was the result of fraudulent intent or not, they are liable in equity to make good all loss occasioned to persons who dealt on the faith that the prospectus was a document disclosing the whole truth. The evidence in the case is substantially the same as was before the House of Lords in *Oakes* v. *Turquand* (3). Each of the learned Lords who addressed the House, when judgment was given, expressed a strong opinion that the prospectus was not fairly or properly framed; and we submit that your Lordship must arrive at the same conclusion.

The relief we ask is, first, that the contract between the Plaintiff and the company may be rescinded, subject to the rights of the creditors—a point left open when the case of *Oakes* v. *Turquand* (4) was before the House of Lords; and, secondly, that the Plaintiff be indemnified in respect of the loss he has suffered by reason of the improper concealment of the state of the affairs of the firm.

The objection is raised, on behalf of the Defendants, that the Plaintiff's remedy is at law and not in equity. In answer to that we say, first, that there is a concurrent jurisdiction in equity in such cases, even where there is only a single Defendant; secondly, that relief will be given in equity in a case such as the present, in order to avoid multiplicity of actions, for at law we should be compelled to bring a separate action against each director; and, thirdly, that one of the directors in the present case being dead, the legal rule, *actio personalis moritur cum personâ*, prevents our bringing any action against his representatives, and, consequently, we must come for relief into this Court.

(1) Law Rep. 2 H. L. 99, 113.
(2) Ibid. 5 Eq. 249, 263.
(3) Law Rep. 2 H. L. 325.
(4) Ibid. 379.

In *Evans* v. *Bicknell* (1) Lord *Eldon* says: "It is a very old head of equity, that if a representation is made to another person going to deal in a matter of interest upon the faith of that representation, the former shall make that representation good, if he knows it to be false." In *Burrowes* v. *Lock* (2) Sir *W. Grant*, M.R., acting on that *dictum*, decided that a trustee who had received notice of an incumbrance on the interest of his *cestui que trust*, but, having forgotten the fact, represented to a purchaser that the interest was unincumbered, was bound to indemnify the purchaser. That case shews that wilful fraud is no ingredient in the equity of the person who claims indemnity. These cases were followed in the recent case of *Slim* v. *Croucher* (3), decided by the full Court of Appeal. The jurisdiction of the Court was upheld in *Colt* v. *Woollaston* (4); *Green* v. *Barrett* (5); *Cridland* v. *Lord De Mauley* (6); *Ramshire* v. *Bolton* (7); and *Hill* v. *Lane* (8); although in all these cases the objection was raised that the Plaintiff's remedy was at law.

In *Barry* v. *Croskey* (9), which was decided on a demurrer, the present Lord Chancellor makes these observations: "I can suppose a bill of this description to be filed against a single Defendant, upon which a Court of Equity, though having indisputably concurrent jurisdiction with a Court of Law, would not think fit to exercise that jurisdiction; but the present bill avers a combination of several Defendants, against some of whom the Plaintiff may have a direct remedy at law, while against others he may have no remedy at law, or no remedy except by as many separate actions of deceit as there are parties Defendants to the suit. The bill avers, whether truly or not it is impossible at present to say, that the several Defendants have combined to practise jointly this scheme of deceit, one being put forward, but as the agent and for the benefit of the rest. If these averments are true, I apprehend it is a proper case for relief in this Court." Here is a case in which we have no remedy at law against some of the parties, viz., the executors of *Gibb;* and our only remedy against the others is by bringing sepa-

(1) 6 Ves. 174, 182.
(2) 10 Ves. 470.
(3) 1 D. F. & J. 518.
(4) 2 P. Wms. 154.
(5) 1 Sim. 45.
(6) 1 De G. & Sm. 459.
(7) Law Rep. 8 Eq. 294.
(8) Ibid. 11 Eq. 215.
(9) 2 J. & H. 1, 30.

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rate actions of deceit; therefore we say, with the Lord Chancellor, that it is a proper case for relief in this Court.

In *Ingram* v. *Thorp* (1) the Plaintiff, to whom representations had been made by a deceased person, was held entitled to have them made good out of his estate. In *Rawlins* v. *Wickham* (2) the like relief was given. That case is valuable as shewing that it is not necessary that the representations be fraudulently made. In *Smith* v. *Pococke* (3) it was decided that the *Statute of Limitations* had no application to a case of this description in a Court of Equity.

It may be said, on the other side, that the representation which we seek to have made good was not made to the Plaintiff, inasmuch as he was not an original allottee of shares, but only a purchaser in the market. But in *Bedford* v. *Bagshaw* (4) a person who had bought shares in the market on the faith of false representations made to the committee of the *Stock Exchange*, was held to be entitled to damages. In *Duranty's Case* (5) it was laid down, that a person who had been misled by reports issued by the directors of a company might have a remedy against the directors.

Mr. *Roxburgh*, Q.C., and Mr. *Lindley*, for the Messrs. *Gurney* and *Robert Birkbeck*:—

In the first place we say, that all observations made in the case of *Oakes* v. *Turquand* (6) must be discarded. The present Defendants had no opportunity of defending themselves in that case, and the evidence in the present case displaces entirely the notion of their having committed any fraud, and establishes that they acted throughout *bonâ fide* and to the best of their judgment. The result of the trial before the Lord Chief Justice shews that. The indictment was framed on the statute 24 & 25 Vict. c. 96; and the issue was, whether the directors issued the prospectus, or conspired to issue it, with the object of defrauding the public. The Lord Chief Justice, in his summing-up, clearly shewed his opinion to be that there was no foundation for such a charge; the jury agreed with him, and he afterwards disallowed the costs of the

(1) 7 Hare, 67.
(2) 3 De G. & J. 304.
(3) 2 Drew. 197.
(4) 4 H. & N. 538.
(5) 26 Beav. 268.
(6) Law Rep. 2 H. L. 325.

prosecution: *Reg.* v. *Gurney* (1). It has been repeatedly held that there is no difference between legal and equitable fraud, and therefore we are fully entitled to claim the benefit of the decision.

If, then, these directors acted *bonâ fide*, how can the Plaintiff complain? The prospectus refers to the articles of association of the company as open to inspection, and therefore the Plaintiff must be taken to have bought with full knowledge of the provisions therein contained: *Hallows* v. *Fernie* (2). Now the articles provide that the directors may purchase, upon such terms and under such stipulations as to guarantee or otherwise, as may be agreed upon, the business of *Overend, Gurney, & Co.* The directors did purchase the business upon terms which they honestly believed would be remunerative, and under stipulations as to guarantee which they honestly considered would be ample security to the shareholders. In all respects, therefore, they acted within the powers conferred on them by the articles, and the Plaintiff is simply in the position of a principal complaining that his agent has entered into a contract which he was duly authorized to make. This is the very point of the decision of the Lord Chancellor in *Overend, Gurney, & Co.* v. *Gurney* (3), a suit instituted by the liquidators in respect of the matters now complained of by the Plaintiff. It may be said that the bill in that suit did not make a case of fraud; and that is true in this sense, that the strong expressions used in the Plaintiff's bill are not in the liquidators' bill; still, all the facts necessary to raise the questions were before the Court, and a demurrer to the bill was allowed.

As regards the second deed, we say that it was entirely subsidiary to the first; that the first contained everything essential to the transfer of the business, and the second was merely a piece of machinery, directing the mode in which the excepted accounts mentioned in the first deed were to be liquidated. The same thing might have been done more simply by a resolution of the board of directors, or by a written memorandum, and then the Plaintiff could not have had even the semblance of a ground for complaint, for the directors are under no obligation to make known all their resolutions to their shareholders.

(1) *Finlason's* Report; see p. 255, *et seq.*, and p. 270.

(2) Law Rep. 3 Eq. 520.

(3) Ibid. 4 Ch. 701.

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Assuming, however, that the directors did not disclose everything which they ought to have done, we say that the Plaintiff, being a mere transferee of shares, and not an original allottee, has no ground of complaint. Suppose the directors had called a meeting and disclosed everything to the original allottees, could a purchaser from one of them afterwards complain? The office of the prospectus is to invite people to come in originally as shareholders, not to invite them to buy shares in the market. There is no privity whatever between a company and a purchaser in the market. In *Blain* v. *Agar* (1), which was a case in which shareholders sought relief in respect of the fraudulent conduct of directors, it was held that the Plaintiffs might maintain their bill in the character of original purchasers, but not in the character of purchasers from prior purchasers (2). In *Bedford* v. *Bagshaw* (3) the ground of the decision was, that the directors fraudulently procured the appointment of a settling day on the *Stock Exchange*, and that without such appointment the Plaintiff could never have been a purchaser; here no such case is alleged or proved. Moreover, at the highest, the Plaintiff could only claim to be in the same position as the person to whom his shares were originally allotted, viz., Mr. *Samuel Gurney*, one of the partners in the firm, and as such well acquainted with the state of its affairs: *Ffooks* v. *South Western Railway Company* (4).

As to the case of *New Brunswick and Canada Railway Company* v. *Muggeridge* (5), that was a suit for specific performance, and the suppression of a material fact no doubt constituted a good defence to such a suit; but it has no application to the present case. There is no foundation for the assertion that at common law you must bring as many actions as you have Defendants: *Chitty* on Pleading (6).

Sir *Roundell Palmer*, Q.C., Mr. *Fry*, Q.C., and Mr. *Sayer*, for *Henry Ford Barclay*:—

The Plaintiff is clearly not entitled to any relief in the shape of setting aside the transfers to him, or having his name removed

(1) 2 Sim. 289.
(2) Ibid. 296.
(3) 4 H. & N. 538.
(4) 1 Sm. & Giff. 142.
(5) 1 Dr. & Sm. 363.
(6) Vol. i. pp. 96, 97.

from the list of contributories. He has been settled on the list by the House of Lords, and must remain there for all purposes. There is no such thing as being a contributory by halves—a contributory until the debts are paid, and then being at liberty to rescind the contract. Besides, it is clearly settled, that after a company is wound up a shareholder's contract cannot be set aside: *Clarke* v. *Dickson* (1); *Deposit and General Life Assurance Company* v. *Ayscough* (2); *Mixer's Case* (3); *Western Bank of Scotland* v. *Addie* (4). This would be so if the Plaintiff were an original allottee; but he is not; he is only a purchaser in the market, and if the contract is to be set aside the former owner ought to be here: *Duranty's Case* (5); *Nicol's Case* (6); *Ex parte Worth* (7). Nor can the Plaintiff have any relief on the ground of negligence. That is not a ground for coming into equity; or, if it be, the Plaintiff should be the company; and, in fact, this question was raised and decided adversely to the company in the suit of *Overend, Gurney, & Co.* v. *Gurney* (8).

There remains only the question, whether the plaintiff is entitled to any relief in the shape of indemnity from the directors. We deny the truth of the proposition, that wherever an action for deceit will lie a bill in equity will also lie. Equity will interfere only in the following cases: first, wherever a contract is to be rescinded; secondly, where fraud, in the proper sense of the word, is to be redressed; thirdly, where a representation has been made which binds the conscience of the party, and estops and obliges him to make it good. In the last case the representation in equity is equivalent to a contract, and very nearly coincides with a warranty at law; and in order that a person may avail himself of relief founded on it he must shew that there was such a proximate relation between himself and the person making the representation as to bring them virtually into the position of parties contracting with each other.

In *Rawlins* v. *Wickham* (9) the object of the suit was rescission

(1) E. B. & E. 148.
(2) 6 E. & B. 761.
(3) 4 De G. & J. 545.
(4) Law Rep. 1 H. L., Sc. 145.
(5) 26 Beav. 268.
(6) 3 De G. & J. 387.
(7) 4 Drew. 529.
(8) Law Rep. 4 Ch. 701.
(9) 3 De G. & J. 304.

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of a contract; it falls, therefore, under the first of the three classes, and is inapplicable as an authority here. Like observations apply to the cases of *Green* v. *Barrett* (1), *Cridland* v. *Lord De Mauley* (2) and *Colt* v. *Woollaston* (3), although into all of them fraud may have entered in a greater or less degree.

As to the cases which rest upon fraud (and the case of the Plaintiff as put by the bill is one of fraud), it is necessary to prove the *scienter* in equity just as much as at law: *Henderson* v. *Lacon* (4); *Ship* v. *Crosskill* (5); *Pike* v. *Vigers* (6); *Attwood* v. *Small* (7); and *New Brunswick and Canada Railway Company* v. *Conybeare* (8).

The third class of cases is illustrated by *Evans* v. *Bicknell* (9); *Burrowes* v. *Lock* (10); *Slim* v. *Croucher* (11); and *Ingram* v. *Thorp* (12). In all of these cases there was a representation made with a view to a particular contract. How can that be said to be so here? The object of the prospectus was to induce persons to become applicants for shares to be allotted to them, and after the allotment was made it was *functus officio*. A person purchasing shares on that prospectus is applying the representations made for one purpose to a wholly different transaction; and, whether or not he can maintain an action, he has no ground for seeking relief in equity: *Burnes* v. *Pennell* (13). This view has been adopted with reference to the very question now under discussion by Vice-Chancellor *Shadwell*, in *Blain* v. *Agar* (14), and by Lord Justice *Turner* in *Nicol's Case* (15), and *Barrett's Case* (16).

Clifford v. *Brooke* (17) and *Ogilvie* v. *Currie* (18) shew that without proof of actual fraud you cannot bring into this Court a transaction which is properly the subject of an action at law.

If a representation has been innocently made by an agent, and it turns out to be incorrect, the agent is not liable: *Cornfoot* v.

(1) 1 Sim. 45.
(2) 1 De G. & Sm. 459.
(3) 2 P. Wms. 154.
(4) Law Rep. 5 Eq. 249.
(5) Ibid. 10 Eq. 73.
(6) 2 D. & Wal. 1, 252.
(7) 6 Cl. & F. 232.
(8) 9 H. L. C. 711.
(9) 6 Ves. 174.
(10) 10 Ves. 470.
(11) 1 D. F. & J. 518.
(12) 7 Hare, 67.
(13) 2 H. L. C. 497.
(14) 2 Sim. 289.
(15) 3 De G. & J. 387, 439.
(16) 3 D. J. & S. 30.
(17) 13 Ves. 131.
(18) 37 L. J. (Ch.) 541.

Fowke (1); *National Exchange Company of Glasgow* v. *Drew* (2); and *Udell* v. *Atherton* (3).

We submit therefore that, fraud in this case being disproved, the Plaintiff has no title to relief in this Court against any of the Defendants, and certainly not against Mr. *Barclay*, who took no part in issuing the prospectus.

Mr. *Fooks*, Q.C., and Mr. *W. Fooks*, for *Harry George Gordon* :—

The case made by the bill is one of fraudulent misrepresentation or concealment. In order to establish such a case fraudulent intent and motive, *mens rea*, must be proved. A false representation does not give rise to an action for deceit unless it is fraudulently made: *Taylor* v. *Ashton* (4); *Scott* v. *Dickson* (5); and *Western Bank of Scotland* v. *Addie* (6). The same rule applies in equity: *Heymann* v. *European Central Railway Company* (7); *Pulsford* v. *Richards* (8); and *Adamson* v. *Evitt* (9). Moreover, the representation complained of must be of fact, not a mere expression of opinion or belief: *Haycraft* v. *Creasy* (10); *Evans* v. *Collins* (11). Again, the damage must be a proximate, not a remote, consequence of the acts complained of: *Collis* v. *Selden* (12).

Therefore, in order to succeed, the Plaintiff must shew, first, that the statements in the prospectus were knowingly false and intended to deceive; secondly, that he was within the class of persons intended to be deceived; thirdly, that he was deceived by the statements in question; fourthly, that the loss he has suffered was the immediate consequence of the misrepresentation. Upon the evidence we say that he has not succeeded in establishing any one of these propositions.

Mr. *Jessel*, Q.C., Mr. *Macnaghten*, and Mr. *Medd*, for *William Rennie* :—

Although it has been laid down that fraudulent concealment is

(1) 6 M. & W. 358.
(2) 2 Macq. 103.
(3) 7 H. & N. 172.
(4) 11 M. & W. 401; 12 L. J. (Ex.) 363.
(5) 29 L. J. (Ex.) 62, n.
(6) Law Rep. 1 H. L., Sc. 145.
(7) Ibid. 7 Eq. 154.
(8) 17 Beav. 87.
(9) 2 Russ. & My. 66.
(10) 2 East, 92.
(11) 5 Q. B. 804.
(12) Law Rep. 3 C. P. 495.

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equivalent to fraudulent misrepresentation, no one has ever said that non-disclosure, without fraud, is equivalent to untrue statement without fraud.

Moreover, it is not competent to the Plaintiff to seek relief against the Defendants on the ground of non-disclosure without fraud. His bill is founded on allegations of fraud, and that being so, he cannot pick out facts which, if properly alleged in the bill, might create an independent equity: *Hickson* v. *Lombard* (1)

Again, on what principle is the amount of relief to be given to the Plaintiff to be ascertained? He is only a transferee; he bought at seven premium; but suppose he had bought at seven discount; then he could not have compelled the Defendants to pay the full amount he had lost.

Sir *R. Baggallay*, Q.C., Mr. *Macnaghten*, and Mr. *Maclean*, for the executors of *T. A. Gibb*:—

We rely on the statute 3 & 4 Will. 4, c. 42, s. 2. It is true that the enactment in terms refers only to actions at law; but wherever there is concurrent jurisdiction Courts of Equity (in the absence of any special circumstances entitling the Plaintiff to equitable relief) adopt, by analogy, the rules adopted in Courts of Law: *Lansdowne* v. *Lansdowne* (2), and *Bishop of Winchester* v. *Knight* (3). In suits of this description there is no remedy in equity, except where there has been profit to the wrongdoer: *Powell* v. *Aiken* (4); or a breach of trust: *Walsham* v. *Stainton* (5). In *Rawlins* v. *Wickham* (6), so much relied on by the Plaintiffs, the issue was, not whether the representations of a deceased person were to be made good out of his estate, but whether a contract he had entered into was to be rescinded; and rescission was decreed.

Mr. *Ferrers*, for the company and the liquidators.

Mr. *Kay*, in reply:—

The result of the indictment cannot in any way affect this case. The Lord Chief Justice, throughout his summing up, carefully

(1) Law Rep. 1 H. L. 324.
(2) 1 Madd. 116.
(3) 1 P. Wms. 406.
(4) 4 K. & J. 343, 358.
(5) 1 H. & M. 322; 1 D. J. & S. 678.
(6) 3 De G. & J. 304.

5 Jur N S 278

(5 S C 9 Jur N S. 1261.

distinguishes between liability in a civil and in a criminal court: *Reg.* v. *Gurney* (1).

It is not necessary in all cases of fraud to prove the *scienter*, even at law. In *Taylor* v. *Ashton* (2), Baron *Parke* expresses his assent to the proposition that in order to constitute fraud it is not necessary to shew that the Defendants knew the fact they stated to be untrue; that it is enough that the fact is untrue if they communicated it for a deceitful purpose. In order to support an action for deceit, "it is only necessary to shew that what the Defendant asserted was false within his own knowledge, or asserted recklessly, without any knowledge on the subject" (3). That was laid down in *Moore* v. *Burke* (4). That case also lays down, that although a prospectus be not the influencing motive to take shares, but a material one, the Plaintiff is entitled to recover. The same thing was laid down in *Clarke* v. *Dickson* (5), and in *Reynell* v. *Sprye* (6).

Nov. 6. LORD ROMILLY, M.R.:—

This suit is instituted by Mr. *Peek*, praying, in substance, that the Defendants, the late directors of the limited company of *Overend, Gurney, & Co.*, and also that the executors of Mr. *Gibb*, a deceased director, out of his estate, may be made jointly and severally liable to indemnify and make good to the Plaintiff the losses he has sustained by reason of his having purchased 2000 shares in this company, in consequence, as he alleges, of the prospectus put forth by the directors, which intentionally suppressed facts of vital importance which, if disclosed, would have prevented him from making any such purchase.

The case, as regards the surviving directors and as regards the estate of the deceased director, is, though in many respects the same, so far distinguishable, that I think it convenient to consider first the case of the surviving directors, and afterwards examine how far these considerations affect the estate of the deceased director.

(1) Fin. Rep. pp. 215, 250, 251, 266.
(2) 11 M. & W. 401; 12 L. J. (Ex.) 363.
(3) 1 Sm. L. C. 6th Ed. p. 168.
(4) 4 F. & F. 258.
(5) 6 C. B. (N.S.) 453.
(6) 1 D. M. & G. 660.

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The case made by the Plaintiff against the directors is the publication of a prospectus knowingly and wilfully incorrect and deceptive; that this incorrectness and deception were not produced by any untrue statement, but by the suppression of a material and important fact. I have therefore to consider whether any fact was concealed, whether it was material, and whether it was known to the directors who issued the prospectus.

In order to explain and fully understand the fact said to be concealed, it is necessary to recur shortly to the formation of this company, and the circumstances and motives which led to it.

The firm of *Overend, Gurney, & Co.* was, in the year 1856, and had been long previously to that period, widely known as a great bill-broking and money-lending firm, of great wealth and influence, and enjoying the highest reputation in the *City of London.* In 1856 *Samuel Gurney* the elder, to whose skill and judgment the position and celebrity of the firm were principally due, died. In 1857 some reverses occurred, and *David Barclay Chapman,* one of the then partners of the concern, retired from the firm. At this time the business and the partners stood in this position:—The *London* bill-broking house was, and always had been, intimately connected with the *Norwich* banking firm of the same name. The *London* firm consisted of four partners; it took three-fourths of the profits made by the *London* firm, and it paid one-fourth of them to the *Norwich Bank.* The *London* firm took no part of the profits of the *Norwich Bank.* Two persons, and two only—*Samuel Gurney* the younger, and *Henry Edmund Gurney*—were partners in both firms. The remaining partners in the *London* firm were *David Ward Chapman* and *Robert Birkbeck.* The *Norwich* firm consisted of seven partners, namely, *Daniel Gurney, John Henry Gurney, Francis Hay Gurney, Henry Birkbeck* and *William Birkbeck,* added to the two members of the *London* firm already mentioned.

Subsequently to this period, namely, the year 1856, the affairs of the *London* firm appear to have been carried on in a very different manner from what they had been during the time of *Samuel Gurney* the elder. Money was advanced on insufficient security, and to assist in hazardous speculations. In 1861, *John Henry Gurney,* who was one of the partners in the *Norwich* firm, and not otherwise than as such interested in the *London* firm, came to

London and attended especially to the business of the *London* firm, which seems to have been carried on almost exclusively under his direction. The business, however, did not improve; the losses continued, the imprudent speculations did not cease; and the consequence of all this was, that in the early part of the year 1865 it became obvious to the partners that they could not go on as they had done, and that some very considerable change must occur, or that both the firms would be compelled to be wound up. Accordingly, in the month of April or May, 1865, Mr. *John Henry Gurney*, Mr. *H. E. Gurney*, and Mr. *Jones*, the solicitor of the firm, met together, and proposed the formation of a company, and the consequent accession of new funds, for the purpose of reinstating the firms.

At this time it is, in my opinion, judging from the evidence before me, clear, that if the firm had attempted to go on without assistance they must have speedily stopped, and that if they had stopped they would have paid but a very small dividend. I say this, judging from the experience (which is large) which the Court has in such matters, and still more so from the evidence of the results appearing in this cause.

In giving the account of the state of this concern which I do here, I shall not refer in detail to those parts of the evidence which appear to me to establish the facts on which I rely, but I shall merely state the results which appear to me to flow necessarily from the evidence laid before me. The *Norwich* firm, it is true, was not implicated in the speculations assisted and fostered by the *London* firm; but the two firms were intimately connected together, both because the *Norwich Bank* was a sharer in the profits of the *London* firm, and because two of its partners were partners in both firms; and I think it clear that no stoppage of the *London* house could have failed to bring with it the downfall of the *Norwich* house. The state of the concern, as it appears in this cause, was most alarming. As I judge from the evidence, the result was that the liabilities of the *London* firm, totally independent of its ordinary and regular business, which it has been pleased in this case to call its legitimate business, were in round numbers four millions sterling. Its assets to meet these liabilities were one million. The balance of loss would be three millions—the exact figures, I

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think, were £3,117,000—and the estimated produce of the whole of the assets was £1,080,000. The firm might be called upon at any time to meet the liabilities; the assets could not be realized without the lapse of much time and the bestowal of much care, and the only fund to meet the excess was to be found in the private resources of the partners. Nevertheless, the members of the firm did not consider, as they now say and contend, that this was a state of insolvency. They endeavour to make out their case in this manner: of course the private fortunes of the partners were assets to pay the debts of the firm, and these might fairly be estimated at £1,257,000. The amount to be obtained from the *Norwich* firm was set down at £767,000; and the goodwill of the *Norwich* firm was put at £300,000, making together £1,067,000; and with the private estates of the partners this would amount to £2,320,000, in addition to which they added the goodwill of the *London* firm at half a million. But even with every mode of putting down the assets in the most favourable manner to them, I cannot make out that a smaller deficit than £500,000 would have occurred if everything could have been realized at once and as favourably as they expected: for it must be borne in mind that in the case of a stoppage the goodwill of a firm vanishes, and also that the compulsory realization of assets, as we learn by daily experience, takes a heavy percentage away from their value.

In this state of things I have carefully considered the matter, and I have canvassed the evidence and the figures which are not in dispute in every way I can; and regarding it most favourably for the partners, I think it clear that in April and May, 1865, the old firm was hopelessly insolvent, and that this circumstance was known to all the members of both firms. I also am of opinion that the project of forming a joint-stock company to carry on the business of the *London* firm was for the purpose of maintaining, or what is vulgarly called "bolstering up," that firm. Thereupon, with this view, they applied to and obtained the consent of four gentlemen of great means and high reputation in the city of *London* to concur with them in forming the joint-stock company of *Overend, Gurney, & Co.* These gentlemen were the Defendants *Henry Ford Barclay, Harry George Gordon, William Rennie,* and a gentleman, who has died pending this suit, named *Thomas Augustus Gibb,* and

whose executors are now defendants to this bill. Better associates could not possibly have been obtained. They were all gentlemen of great commercial experience and high reputation in the city of *London* for practical, businesslike habits, and were also all wealthy men. To these gentlemen the partners in *Overend, Gurney, & Co.* frankly and openly explained their condition, the state of their firm, and laid open to them all their accounts; and, with this knowledge before them, they all consented to join in forming the new company of *Overend, Gurney, & Co.* They were well aware, as they must have been, that in the state of the commercial world at that time the shares in the new company would be eagerly sought for, and that no difficulty would be found in filling the list of shareholders. Accordingly, on the 12th of July, 1865, they issued a prospectus for the formation of a limited joint-stock company for the purchase of the business of the old firm at the price of £500,000, of which one-half was to be paid in money and the other half in shares, on which £15 per share was to be credited as paid up. The capital of the company was to consist of 100,000 shares of £50 each, on which £15 per share was intended to be called up. With a million and a half sterling to be thus obtained, they did not doubt the power of the company to tide over the then existing difficulties of the old firm, and to lay the foundation of a new and thriving concern, carrying on and confining its business to what was called the legitimate business of the old house of *Overend, Gurney, & Co.* Now, in doing this, I am convinced that they all acted *bonâ fide*, with their eyes open. It was done to protect and preserve that most valuable asset, the reputation and goodwill of the old business, the value of which they estimated, and perhaps justly, at £500,000, but which goodwill would become zero if the old firm were stopped.

Nothing, I think, shews more clearly what was passing in the minds of all the directors than the following passage in the answer of *Henry Ford Barclay*: "From my connection with the families of the *Gurneys* and *Birkbecks*, I knew that the business carried on by them under the style of *Overend, Gurney, & Co.* had for many years been extremely lucrative and profitable, that the said firm were in first-rate credit, and that the various members of the said firm were possessed of great wealth; and until the month of May,

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1865, I had no reason to believe, and did not believe, that the business carried on by the said firm had been otherwise than uniformly profitable. Some time towards the end of that month, my wife's sister, *Elizabeth de Bunsen*, who was then staying at my house, spoke to me concerning the affairs of the said firm. She then informed me that it was considered advisable, owing to heavy losses which had been sustained by the said firm, to take steps for the introduction of fresh capital into the said business. This was the first intimation to me that the said firm had not been always most prosperous and successful. The said *Elizabeth de Bunsen* asked me to see her brother, the Defendant *Henry Edmund Gurney*, and to endeavour to settle with him some plan by which the private funds of some of the members of the family might be applied in the purchase of the business or the reconstruction of the said firm. She also then stated to me that she believed that several members of the family not then actually connected with the said firm would be ready and willing to join in any suitable plan which might be devised, and to contribute funds for the purpose of carrying such plan into effect. Accordingly, I shortly afterwards had an interview with the Defendant *Henry Edmund Gurney*, at the *Fenchurch Street* railway station, when we discussed the matter shortly, and I perfectly recollect that he then incidentally stated to me that the said firm could pay all claims, and were in fact perfectly solvent. A few days afterwards I had another very brief interview with the Defendant *Henry Edmund Gurney*, in *Lombard Street*, when he informed me that there was an amount of £4,000,000 locked up in securities, which were not immediately convertible, and he also stated that there was capital of about £1,000,000 standing to the credit of the partners. I gathered from the conversation of the Defendant *Henry Edmund Gurney* that he considered that if £500,000, or thereabouts, of additional capital could be contributed by various members of the family not connected with the said firm, such a sum would be sufficient for the requirements of the said firm, and that the business and profits of the said firm were large enough to employ such additional capital most profitably. I thought that I and some others connected with the *Gurneys* could contribute from £400,000 to £500,000; but, having regard to the magnitude of the business, and especially to

the amount of the deposits, which I was informed then amounted to no less than £14,000,000, I did not agree with the view expressed by the Defendant *Henry Edmund Gurney* that such a sum would prove sufficient. At the Defendant *Henry Edmund Gurney's* request, on leaving him, I called on and had an interview with the Defendant *William Rennie,* and very shortly discussed the same matter with him. To the best of my recollection he agreed with me, that from the enormous business in which the said firm were engaged, and the immense sums with which they were in the habit of dealing, the whole matter was too large to be undertaken by any private means which we could command."

I select this passage, not that it is evidence against the other Defendants, but because it appears to me to express very clearly what the rest of the evidence establishes to have been present in the minds of all the Defendants, namely, that the leading object of the formation of the new company was to prop up the old firm, and, to use the words I have read, that the matter (that is, the support of the existing concern) was too large to be undertaken by any private means which they (that is, the partners), or their families, could command. It was to supply this deficiency, which the partners and their families could not command money enough to meet, and in the expectation that the million to be obtained from the new joint-stock company would be sufficient to restore and retrieve the firm, that the scheme was entertained and the company established. This fact, the real object of the formation of the company, was wholly concealed from the public; but the fact was perfectly well known to all the persons who joined to form the company, and this is admitted by them all.

Then comes this question: was it honestly concealed from the public? By the word "honestly" I mean this: were the directors, in forming this company, aware that it was essential for the accomplishment of their object, that is, the formation of this joint-stock company, that the state of the old firm should not be divulged? In other words, was it essential that the fact, to put it no higher than Mr. *Henry Ford Barclay* puts it, that if the firm had been then wound up it would have required all the private estates of the partners to enable them to meet their liabilities—was it essential that this circumstance should not be divulged, and did

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they conceal it accordingly? It is necessary, therefore, in the first place, in order to arrive at a correct answer to this question, to examine minutely in what respect this fact was material; and I think that the word "material" here means, whether the publication of this fact would have prevented the formation of the company. Then it must be ascertained whether the directors were cognisant that this would have been the result of publishing this fact. As to the first, I am of opinion that the fact was most material; and the evidence in this case, in my opinion, proves it, if there could, indeed, have been any doubt upon the matter, or the necessity of any evidence to prove it. What first began to shake the stability of the concern? The evidence shows that it was a report, too well founded, that the partners were selling their private estates in order to meet the liabilities of the old firm. But even this is not required. It is only necessary to open our eyes and examine what occurs daily among the merchants and men of business in the city of *London* to see that the slightest inkling of a doubt as to the stability of the old firm would instantly have occasioned a most searching investigation by the most able and competent persons into, and a complete disclosure of the state of the old firm. I do not entertain the slightest doubt that if it had become generally known, when the prospectus was issued, that the liabilities of the old firm exceeded £3,000,000, and that to meet this amount of liabilities the firm had no assets that were not already engaged to meet the current liabilities—that they had in fact nothing with which to meet it but the private fortunes of the old partners and the goodwill of the business—if this had been known, I say, I do not doubt that few, if any, shares would have been taken in the new company; and in so stating the case I am, in my opinion, considerably understating the position in which the business stood, and I am wholly omitting a most material element in all such cases, namely, the impossibility of rapidly realizing securities, and the equal impossibility of preventing creditors from rapidly enforcing their claims. What I have now stated is, in my opinion, shewn by the whole course of those events which have accompanied the formation of this disastrous company. The facts of this case prove how material the formation of the company was for the maintenance of the old firm; for not only could not the old firm have gone on without assistance,

but even the million subscribed by the public was not sufficient to enable them to do so, though confined to the legitimate business, as it is called. The concern was dragged down by the dead weight of the liabilities of the old firm, for which the new company was not liable. I am of opinion, therefore, that this fact, namely, the state of the old firm, was a most material fact.

The second question is this: Did the directors know this? I do not entertain the slightest doubt that they all perfectly well knew it, and knew well, that if the company was to be formed at all this fact must not be told. It is to be remembered that these were all gentlemen well versed in commercial concerns, and perfectly cognisant of all the phases which they take, and upon what slight matters the credit of a business may depend, and how slight a matter will shake it and test its stability to the utmost. I believe that they would not have hesitated in expressing an affirmative opinion as to the materiality of the knowledge of this fact in any similar case in which they were not personally concerned. But then arises the observation so strongly put forward on their behalf—If they thought so, why did they embark in the concern? Why did they advance large sums of money in a concern which, as the event shews, was sure to come to ruin, and to involve them in a great pecuniary loss; and why did they stick to the concern to the last? The answer is, that they were embarking personally in a great speculation which they believed would turn out well, and which, if it did, would produce a large amount of profit to them; that it was a question of probabilities, and that they had calculated the chances with great care, and had convinced themselves that they should win. But, as in many other cases of similar speculation, they miscalculated the chances; they did not take into account the events which might and which did arise. They did not foresee, they did not allow for, the crisis and general panic which were about to arise. They knew, as Mr. *Henry Ford Barclay* says in the passage which I have read, that the firm could not go on with the means of the existing partners; but they honestly, that is they truly and firmly believed, that with one million, or one million and a half, to be levied from the public, they would be able wholly to reinstate the affairs of the concern, and that, when once the difficulty was tided over, the great and

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lucrative business, what is called the legitimate business, of *Overend, Gurney, & Co.*, would produce great profits to all the members of the company.

But then comes this question: Were they justified in inducing the public to join with them in a speculation which they honestly believed would turn out successful, without giving the public all the information they themselves possessed about the matter? This raises the great and important question, which arises in a Court of Equity, but which did not, and could not, arise in a Criminal Court, namely: Does this honest sincere belief in the probable success of a company exonerate the directors who form it from the consequences of the concealment of an important fact on which it is highly probable that the success of the scheme may depend? Does it justify such directors in retaining in their own breasts all knowledge of this fact? It does exonerate them from any liability in a Criminal Court; does it do so in a Court of Equity? I think not. Does the innocent concealment of a most material fact by a man who by so doing has induced another to embark in a concern which is equally injurious to both, and which the other man would not have embarked in if he had known the whole truth, exonerate the man who has concealed it? It is proper, however, that I should guard against a misconstruction, or rather misconception, of my meaning in using the word "innocent." I mean merely that the concealment, however culpable, does not amount to a crime. There is, as I shall presently have occasion to observe, every species of gradation of culpability in these matters. In the case of a concealment of a most material fact, does the belief of the concealer that such concealment will be beneficial to himself and to the man whom he induced thereby to join with him in the speculation, exonerate him from the consequences? I think not.

It is to be observed also, in my judgment, that the fact concealed was of such moment that upon its being known or not depended the whole scheme; that the formation of the company was impossible if it had been known. It appears to me, nor do I entertain any doubt on the matter, that when the directors met together they assumed, as a matter of course, that the then state of the firm was not to be divulged; not that any one proposed its concealment, and that another assented to any such proposition, but that it

was treated by common consent as a matter of course. If it had been suggested it would have been stopped at once, as, if done, fatal to the whole scheme. They considered that the public must judge for themselves in these matters, and that, if not required, it was not for them to volunteer information. They might have said, the formation of such companies is common but such investigation is rarely required, and here certainly it was never even asked for. It is very possible that in ordinary cases this may be true; but in a vast concern, known to be carrying on a large and lucrative business, and where the partners were all men of large property, the insolvency of such a firm, coupled with the doubt whether, even with the assistance of the whole of the private fortunes of all the partners, the liabilities could be met, and the certainty that they could not if rapidly enforced—in such a case the insolvency of the firm about to be converted into a joint stock company ceased to be an ordinary circumstance.

I am of opinion, therefore, that, even if, so far as the extent of the business of the old firm was concerned, such an excuse or defence could be correct, and conceding that, if there had been no exceptional matters in the case of the liabilities and the assets belonging to it, the concealment of the state of the concern would not have been material—even if this be conceded, which concession I should not be disposed to make without qualification—still, in a case where the liabilities exceeded the assets and the securities by three millions, and this deficiency could be met only by the private estates of the partners and the value of the goodwill, that is, the reputation of the old firm, then the fact becomes of far greater importance, and assumes a far graver aspect. When the unexpected calamity happens, a director cannot be allowed to say, "I knew the fact well, but I did not consider it of any moment." The Court must judge for itself whether it was of moment or not, and will impute to each director that knowledge which, if he did not possess, he ought to have possessed, and will visit him with the consequences naturally flowing from it. This, in my opinion, is a familiar doctrine of equity. It would be easy to illustrate it by many instances, but I will only take one. Suppose the assignee for value of a patent were to found a joint stock company for the purpose of working the invention, which was one of great value,

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and that he was aware that the original inventor and patentee contested the validity of the sale to the person from whom the assignee and founder had bought it, or that some stranger was contesting the validity of the patent itself; but that having examined into the matter, the founder of the company had convinced himself that the sale was a good one, and that neither the original patentee nor the stranger would be able to disturb the sale or the patent: in such a case, would the founder of the company be justified in concealing this fact from the persons applying for shares, and could he afterwards keep the allottees to their bargain when it appeared that the patentee was instituting proceedings to set the whole aside; and could he be allowed to say, "I looked into the matter carefully, and satisfied myself that the original patentee or the stranger about to contest the validity must fail"? Still less could he do so after the original patentee or after the stranger had succeeded, and the subject-matter of the patent had become of no value; nor would it be any excuse in a Court of Equity that the person so founding the company honestly believed what he said, and had embarked all his own property in the speculation.

Here I cannot but make one observation on what appears to me the extremely ill-advised prosecution of the directors for a criminal offence—an offence of which I venture to think no rational man could ever have found that they were guilty. No doubt they did not intentionally try to induce persons to put money into a concern which they knew or believed would fail. They firmly believed that it would all turn out well for themselves and for the others; but this is no excuse in equity, which requires, to sustain such transactions, not that there should be merely an absence of any intention or even of any motive to deceive, but that the truth should be told, and that not partially, but that the whole truth should be told. And the man who induces another to enter into a contract without telling him the whole truth relative to the subject-matter of the contract, cannot afterwards compel that person to perform the contract entered into in such ignorance, or escape from the necessity of making good to him the injury he has inflicted upon him. Accordingly I am of opinion that the trial at *Guildhall* before the Lord Chief Justice, admirable as his summing-

up was, and in every way correct as the verdict of the jury was, has nothing whatever to do with this case, and that if it were allowed in any respect to influence my judgment in this case, it would, in my opinion, be tending to sap the foundations of the highest principles on which the doctrine of equity depends, the doctrine of which may be expressed in the words under the sanction of which witnesses give evidence, and which requires the truth, the whole truth, and nothing but the truth to be told.

A more dangerous doctrine could scarcely be laid down than that, unless a fraud is of so deep a dye of moral turpitude that it amounts to a crime and is punishable in a Court of criminal jurisdiction, the Court of Equity has no power to entertain the consideration of it, or to compel the author of it to rectify the calamities he has thereby produced. The distinction between the case of equitable and criminal jurisdiction in matters of fraud is laid down in many cases, but I think it is well put in *Burnes* v. *Pennell* (1). It is the *suppressio veri* or the *suggestio falsi* which is the foundation of the right to relief in equity, and this exists whether it were fraudulently or mistakenly done. It is the superadded guilty intention which gives the criminal jurisdiction, but which does not take away the equitable jurisdiction. A man may not have intended to deceive, and may have believed that he did not, when he was really suppressing the truth or suggesting what was false. If so, he is not liable to an indictment in a criminal Court, but he is equally responsible in equity as if he had, while committing these acts, done so with a view to injure others or to benefit himself.

Burrowes v. *Lock* (2) and many other cases establish that distinction. No doubt the trustees in that case could not have been made guilty in a criminal Court, and had it not been for the ill-considered prosecution in this case I should not have expected to have heard this doctrine questioned.

In stating the proposition, I have said that the absence of any intention and of any motive to deceive would not, in equity, support a contract founded on the suppression of a material fact, or relieve the concealer from the consequences of so doing; but I am by no means of opinion that the present case can be put so high in favour of the Defendants. The real state of the case I believe to be

(1) 2 H. L. C. 497. (2) 10 Ves. 470.

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this: they wished to form this company; they believed sincerely and honestly, after investigation, that it would turn out profitably for themselves and the other shareholders, and, come what might, they intended to stick by the company; but they knew that any disclosure of the circumstances of the old firm would render it impossible to form the company, and accordingly it was a *sine quâ non* that these should not be divulged. I do not think that anything turns on the fact of two deeds instead of one; the material consideration is, that it was necessary that nothing should lead any one to ascertain and publish the condition of the old firm, which, if done, would have rendered the whole scheme impracticable; and this was, in my opinion, not only true, but it was the truth well known to every one of them, and the concealment runs through the whole transaction. It is true that Mr. *H. F. Barclay* says in his answer that he expected "that the company to be formed for this purpose would be honestly and rightly" brought before the public by the promoters, of whom he says he was not one. On considering his answer, however, I am not of that opinion. But it is not material; for most certainly he was one of the first directors, and most constant in his attendance, and it was his duty to see that this honest disclosure had been made, which, in my opinion, it had not. I have no doubt they all thought alike in the matter, but this expectation and intention so spoken of by him did not include the communication of the state of affairs of the old firm. If such a communication had been made there would have been an immediate stoppage of both the old firms, and a meeting of the creditors of both would have been called; but the panacea adopted in ignorance of the truth, that a new joint stock company should be established, would not, as I believe, have been possible. In truth the case stands shortly thus: to disclose the state of the firm was bankruptcy to the partners; to conceal it was the establishment of a new, and probably a thriving, joint stock company. I find myself unable to make any distinction in this matter between Mr. *Henry Ford Barclay* and the rest of the directors. It is clear that they all acted together; that they all approved of the prospectus, if not before it was issued, immediately after it was issued; and Mr. *Henry Ford Barclay*, who had been previously consulted and induced to join, on his return,

found no fault with it, nor proposed any alteration or fresh communication to be made to the public.

The prospectus itself is a model for such a purpose. The first sentence I believe to be strictly true, when the directors said that, in their opinion, it would insure a highly remunerative return to the shareholders; but the shareholders had not the means afforded to them of forming an independent judgment on that subject. The second paragraph it was not in the power of the members of the old firm to perform. The state of the existing liabilities and assets of the old firm made it impossible for their guarantee to be worth anything, and this by reason of the insolvent state of that firm; but no allusion is made to the amount of the claims against the old firm, all of which would have, as I now understand it, to be made at the office of the new company, and to be there paid out of the general assets of both the old firm and the new company, subject to the subsequent apportionment of them between the members of the old firm and the shareholders of the new company. It is not as if the creditors of the old firm, or any selected number of them whose liabilities were not taken up by the new company, would have had to present their claims at a different office, and to be paid in a different place; but, so far as the public were concerned, they seem to be treated as all alike, without any distinction. Accordingly I, after some time, became aware of the utter inutility of what I at first was anxious to obtain, namely, a correct list of all the liabilities repudiated by the new company. I had at one time imagined that a creditor of the old firm, whose liability had not been adopted by the new company, would, on presenting his bill or making his demand, have been informed that he must go elsewhere to be paid, and that the only persons liable to pay him were the members of the old firm, and not the assets of the new company of *Overend, Gurney, & Co.*, who repudiated the transaction. This, of course, as I saw clearly upon a fuller examination of the matter as the case proceeded, was impossible. The new company were obliged to pay all the debts, whether of the old firm or the new company, whether adopted by them or not; and had they not done so, an immediate bankruptcy of the old firm and an overpowering run on the new company would forthwith have taken place. All that the new company of *Overend, Gurney, & Co.* could do was to require

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the members of the old firm to supply them with money to meet these claims. The result was that which might naturally have been expected; they sold their estates to supply the necessary funds, and even by so doing the members of the old firm were not able to supply the new company with money sufficient to meet the demands made upon them, and repay the advances made by the new company for liquidating these claims. In the meantime the sale of the private estates and the realization of the private property of the old partners startled and alarmed the public, the shares began to fall, the claims began to multiply, and the assets failed. The *Bank of England* was applied to for assistance, and very wisely refused to make any advances; and the company stopped payment, and has had to be wound up in chancery.

After the occurrence of these events it seems quite simple that all this should have happened; and it seems quite strange that it should not have been foreseen by the gentlemen who joined or who established the concern as directors; but in truth they were all carried away by their sanguine expectations of the profits to be ultimately realized, and thereby involved themselves, and many others who were ignorant of the previous state of the concern, in great and heavy losses. But this mistake on the part of the directors does not, in my opinion, exonerate them from the consequences of their having failed to divulge the important fact on which the whole scheme turned; and the result is that, in my opinion, if in this case any one of the shareholders in *Overend, Gurney, & Co.* had, shortly after the shares had been allotted to him, discovered, either by inspection of the books or otherwise, the facts appearing in the papers before me, and had stated them in a bill, and had required his shares to be cancelled and his money to be returned, this Court would not have hesitated to give him the relief he asked for, or, if that was impossible, would have made the directors personally liable to make good to him the losses he had sustained.

There is, however, one view of this case, that was presented to me by Mr. *Roxburgh*, to which, though it does not, in my opinion, alter the view I have taken of the case, it is necessary to refer. It is suggested that the public were not asked to become shareholders in a company formed to carry on the business of *Overend*,

Gurney, & Co., which had been bought by the directors, but that they were invited to confide to the directors to make that purchase, and to complete the whole arrangement for that purpose, and that the whole management of it was confided to them, and that the shareholders cannot now complain, the more so as the directors, having been themselves deceived, cannot be supposed to have intended to deceive the public. But in truth, if this were so, it would leave the matter exactly in the same position, because it was equally the duty of the directors to inform the persons whom they asked to authorize them to buy the business at half a million what they had ascertained to be the state of the concern before they reposed that trust in them. But in truth this company does not in the least differ from the multitude of other companies which have been founded on the purchase of private businesses, and which are all subject to the same rules and governed by the same equities. I retain therefore my opinion, that a shareholder who came in sufficient time would have been enabled to get rid of his contract to take shares, or obtain indemnity from the directors.

This, however, does not dispose of the present case. There are two other considerations which must be carefully borne in mind and examined in this case. The plaintiff was not an allottee of these shares. Does the case of deception apply to the case of a transferee, as well as to the case of an allottee? And still more (which applies to both cases in a greater or less degree), does the Plaintiff come in sufficient time and with sufficient diligence to induce this Court to interfere in his favour?

As regards these two latter considerations, the facts appear to me to press strongly against the Plaintiff. In considering them I am, of course, assuming that if the matter had been brought immediately to the cognisance of the Court the allottees could have renounced their shares and could have required to be repaid their advances, or could have obtained indemnity. But a question of considerable importance and of a distinct character arises as regards the transfer of a share, namely, whether the misconduct of the directors is a vice that taints the share itself, into whosesoever hands it passes, or whether the share itself is purified by the conduct of the allottee or any subsequent holder of the share. I will endeavour

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to illustrate my meaning by an example. Directors are guilty of improper concealment and of unfounded representation; an allottee who takes a share discovers their misconduct, and calls on the directors to cancel his share; they consent, but point out to him that the other advantages of the scheme are so great that it will still in all probability succeed—a circumstance which might possibly have occurred in the present case. The allottee, after fully considering the matter, resolves to keep the share, notwithstanding the misconduct of the directors, and afterwards he sells his share to *A.* Can *A.* proceed against the directors, or is his remedy limited to an action against the original allottee? Of course the same point would arise in the case of laches or of undue influence. The decided cases seem to be at first sight not quite in harmony with each other on this point. The cases of *Blain* v. *Agar* (1) and *Duranty's Case* (2) seem to point one way; while *Bedford* v. *Bagshaw* (3) seems to point in a different direction. But I think these cases are reconcileable, and that if the allottee is barred by time or condonation, the transferee is bound also by the same bar. If I intended to proceed entirely upon this ground, it might, I think, require further investigation; but as the matter now stands, and being of opinion that the Plaintiff could do no more than the original allottee could have done, I think the original allottee was cognisant of the whole matter.

But besides this objection to the Plaintiff's demand, I think the delay of the Plaintiff in instituting proceedings in this case is fatal to his success. It is necessary, in considering the question of time, to keep distinct the case where the holder of the share repudiates his contract, and applies to this Court to annul it, and to remove his name from the list of shareholders, and the case where, being unable to obtain this latter relief, he applies to make the directors answerable for having induced him to take the shares. Here, whatever may have been the misconduct of the directors, the repudiation of the shares and the cancellation of the contract is not open to the Plaintiff, nor indeed is it asked for by the Plaintiff's bill; for though the conduct of the directors as regards the suppression of truth and the misstatement of fact must

(1) 1 Sim. 37; 2 Sim. 289. (2) 26 Beav. 268.
(3) 4 H. & N. 538.

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be treated alike in both cases, and I have consequently so dealt with it in the observations I have already made, yet the time which has elapsed, and the order for the winding-up of the company, have entirely shut off the Plaintiff from obtaining the former branch of relief; it having been settled in this very case, under the name of *Oakes* v. *Turquand* in the House of Lords, and also in *Kent* v. *Freehold Land and Brickmaking Company* (1), that in order to obtain the first branch of the relief—namely, the cancellation of the shares and the return of the deposit—the repudiation of the shares must be by bill, which must be filed before the winding-up of the company has commenced, as was the case in *Reese River Silver Mining Company* v. *Smith* (2).

The question here is, therefore, reduced to this: whether the personal liability of the directors depends on the same or on similar principles as regards the time when that relief is sought, as it does when the cancellation of the contract is asked; or whether there is any, and if any what, lapse of time which will bar the shareholder from requiring the personal indemnity of the directors who have improperly induced him to take the shares. I intend by no means to lay down a hard and fast line that the liquidation of the company bars all this relief, as it does the cancellation of shares; and it is also true that the usual rule of equity is, that a man is entitled to relief as soon as he discovers the fraud practised on him, and that he is not barred by time previously elapsed; but it is also true that this rule does not apply to a case where a man wilfully shuts his eyes, and refuses to investigate the matter, which, upon principles of ordinary common sense, he is called upon to do. When a man takes shares in a company he ought to ascertain at once whether the representations on the faith of which he took his shares are correct or not. I apply the word "representations" in the largest and most general sense; for where a man conceals an important fact, it is virtually equivalent to a representation that the fact concealed does not exist, and in all such cases the allottee ought, by investigation of the books and inquiries from the directors, to ascertain the real state of the case. If he postpones doing so for an unreasonable time this Court will not relieve him. What is an unreasonable time must depend upon

(1) Law Rep. 3 Ch. 493. (2) Law Rep. 4 H. L. 64.

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circumstances; but unquestionably a most important circumstance is the failure of the company; and if he does not apply for redress before that event it becomes rigidly incumbent on him to shew why he did not come sooner; and though no technical rule, as in the case of the cancellation of shares, applies as regards the liability of directors, yet morally, and so far as equity is concerned, the same principle applies to both cases. I do not mean to say there may not be cases where there have been criminal falsification and concealment in the strictest sense of the word, and devices used to prevent investigation, where the mere failure of the company would not bar the applicant who sought to make the directors liable; but the burden of proof falls on him to shew that it is not the mere failure of the company which has caused this proceeding. In ordinary cases a shareholder must apply at once without watching for the success or failure of the scheme. The Plaintiff in this case did not apply for shares to be allotted to him, but bought shares in the market, in October, 1865, and again at the beginning of January, 1866; but he never made any inquiry into the matter or the condition of the concern until after the failure of the company, which was on the 10th of May, 1866, when the bank stopped. I consider that in this matter Mr. *Peek* cannot, as I have already stated, be put in a more favourable position than if he had been an original allottee. The consequence is, that from July, 1865, when the original prospectus was issued, until May, 1866, no sort of inquiry was made by him, nor was any investigation attempted; nor do I believe that any investigation would have taken place, or any inquiry have been made down to the present time, had it not been for the failure of the company. There is no conduct more rigidly reprobated in equity than the system of playing fast and loose—the intention of adopting a company if successful, and repudiating it if it fail—of calling upon directors for indemnity for the suppression of facts if the plan be disastrous, and of condoning it if the plan prosper. I am of opinion that I should be violating this principle of equity if I were to give relief in this case. I am of opinion that the Plaintiff comes too late for equity to assist him, and that on this ground I must dismiss his bill.

I now turn to the case of Mr. *Gibb's* executors. The observations I have hitherto made apply to all the surviving directors. These

observations show that as regards Mr. *Gibb's* estate, the case, in my opinion, stands exactly in the same position as that of the others. If an allottee had, before the failure of *Overend, Gurney, & Co.*, or of their loss of credit, applied to this Court for relief, either in the way of cancellation of the shares or making the directors liable for their suppression of truth, the estate of Mr. *Gibb* would have been equally liable with the surviving directors, and the decease of one would not exonerate his estate from the liability to repair the wrong he had done. I shall treat his estate, therefore, as I should have treated him if he had been alive, and for the reasons I have stated I shall dismiss the bill as against his executors as well as against all the other defendants. But I shall dismsss the bill without costs, and I do so for this reason, which I wish fully to explain: that, in my opinion, the directors were guilty of gross misconduct in concealing the insolvency of the old firm. Mr. *Roxburgh*, in a very able part of his argument, pointed out many passages in which the words "a dishonest and nefarious purpose," or equivalent expressions, were employed in the bill as applicable to the directors. He observed justly that the Court treated with great severity charges of fraud where they were not proved; and he referred to observations of mine in former cases where I have repudiated any distinction being taken between equitable fraud and moral fraud, and where I have stated that all fraud was dishonest and must be treated as such. He then referred to the trial on the indictment, to shew that they had been acquitted of all criminal fraud, and he thence inferred that they were acquitted of all moral fraud and therefore of all equitable fraud; and that as a necessary consequence the bill must be dismissed with costs. This same line of argument was adopted generally for the defence. I assent in a great measure to the argument, which at the time, and since, I thought very ably put, and which I have endeavoured to state as fairly as I can; but it appears to me to involve this assumption, which I think erroneous, viz., that all frauds are of equal moral intensity. But it is not because all frauds are dishonest, and all frauds are treated as such in a Court of Equity, that therefore there is no distinction between one species of fraud and another. Some are of much deeper dye than others; and it is not until the frauds

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assume such deep dye, that they are cognisable by a Court of criminal jurisdiction. It is not that they are not all highly culpable in an extended moral sense, but that they are not all criminal in the sense that, under the statute passed for that purpose, they can be taken notice of in a Court of criminal procedure. The case of *Burrowes* v. *Lock* (1) affords an illustration of what I wish to convey. The trustees there said that there was no prior charge on the fund; there was such a charge, but they had forgotten it; they were compelled in equity to make it good. It is obvious that, if this transaction had occurred yesterday, no criminal indictment could have been maintained against them; they would have been triumphantly acquitted. But were they therefore absolved in equity? Far from it. Whether they had or had not forgotten the matter was a thing between themselves and their own consciences; no one could prove it; but they were bound to know the truth and to tell it, and equity treated them exactly as if they had known it. Suppose it to have been proved in that case that the trustees did remember the prior charge when they denied its existence, but that they did so in the belief that the estate was sufficient to discharge both, and that on a criminal indictment they had been found not guilty, having in fact no object to gain or advantage to obtain: would that fact have paralysed the arm of equity, and would it have exonerated them from the consequence of having innocently said what was false? Certainly not. This is a similar case. Here the directors were not only bound to know the state of the concern, but they did actually know it, and they suppressed the fact. They did so innocently in this sense, that they did not gain, and did not seek to gain, any advantage to themselves by such concealment; but they were nevertheless highly culpable in a moral point of view, although the act was not one cognisable in a Court of criminal procedure, but was one which by the English law (I think properly) is not treated as a crime. But the equitable jurisdiction and the consequences remain untouched, and I should, in my opinion, be acting improperly if I were to give costs to the persons who, in my judgment, have by their misconduct occasioned the calamities caused by the failure of *Overend, Gurney, &*

(1) 10 Ves. 470.

Co., even though the calamity has to some extent fallen upon themselves.

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Bill dismissed without costs.

Solicitors: Mr. *W. A. Downing;* Messrs. *Young, Jones, & Co.;* Messrs. *Bevan & Whitting;* Messrs. *Wilson, Bristowes, & Carpmael;* Messrs. *Young, Maples, Teesdale, & Co.;* Messrs. *Uptons, Johnson, & Co.;* Messrs. *Maynard & Son.*

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[1870 R. 178.]

Legacy to Infant—Charge on Real Estate if Personal Estate deficient—Waste by Executor—Time when Deficiency to be ascertained.

Where a legacy to an infant, with interest for maintenance till twenty-one, was charged on testator's real estate, if the personal estate should be inadequate, and the personal estate was sufficient for all the purposes of the will at the time of the testator's death, but was subsequently wasted by the testator's personal representative:—

Held, that the legacy could not, on the infant attaining twenty-one, be made chargeable on the real estate.

JOHN MORTON, by his will, dated the 27th of June, 1855, bequeathed to *Thomas Richardson*, then an infant, the sum of £350, with interest at 4 per cent. till he should attain twenty-one, to be paid to his father in the meantime for his maintenance; and after certain other legacies the testator gave his estate at *Bowstead Hill* to his brother *William Morton*, and *Ann*, his wife, and the survivor of them, for life, charged and chargeable as thereinafter mentioned, and subject thereto he devised the same to his nephew *Thomas Morton* in fee; and he gave to five other nephews and nieces £100 each, to be paid to them, without interest, when *Thomas Morton* should come into possession of his said estates; and he charged the same upon the said estate accordingly, in exoneration of his personal estate, the said legacies to be vested interests in the said legatees from the date of his will. And after making certain specific bequests the testator gave all the rest of his personal estate to his said brother, *W. Morton*, for his own life, but subject to the

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payment of his debts and funeral and testamentary expenses, and the aforesaid legacies; and in aid thereof, he thereby charged and made chargeable the said hereditaments at *Bowstead Hill* with the payment of the said residue of his just debts, funeral and testamentary expenses, and the bequests aforesaid, as his personal estate should be inadequate to discharge; and he appointed the said *William Morton* his sole executor.

The testator died in 1855, and his will was proved by *William Morton.*

The personal estate was sufficient for the payment of all the legacies with the duty thereon, including the duty on the legacy to *Thomas Richardson.*

The following entry was made by *William Morton* on the form supplied by the Legacy Duty Office:—

"Retained, the 20th of May, 1857, the sum of £350, being the legacy above mentioned, having first allowed or paid £10 10*s.* the duty thereon."

He also paid interest at 4 per cent. on the same legacy to the father of the infant, but did not appropriate any particular investment to answer the legacy, but left the amount mixed with his own property.

There were also other sums belonging to the testator's personal estate in his possession, amounting to £1100, retained in a similar way.

William Morton died in 1858, and appointed *James Morton* his executor and residuary legatee, leaving assets sufficient to satisfy the legacy in question.

James Morton proved the will of *William Morton*, and paid th interest on the legacy up to the beginning of 1866, but by that time he had squandered all the property, and become insolvent.

In the meantime *Ann Morton* had died, and *Thomas Morton* had entered into possession of the real estate under *John Morton's* will.

In December, 1870, *T. Richardson* attained twenty-one, and shortly afterwards died; and his father having taken out administration to him, instituted this suit against *Thomas Morton* and *James Morton*, claiming payment of the legacy out of the estate at *Bowstead Hill.*

Mr. *Fry*, Q.C., and Mr. *Bury*, for the Plaintiff:—

The legacy to the Plaintiff is chargeable on the real estate at *Bowstead Hill*.

In *Howard* v. *Chaffers* (1), where a testator gave his real estate to *A.* and *B.* for a term of 800 years, to secure payment of so much of his debts and legacies as his personal estate should be insufficient to pay, and subject thereto gave his residuary real estate to *A.* and *C.*, who were his executors, and the testator's estate at his death was sufficient to pay all his legacies, but the executors left the legacies unpaid and wasted the estate, and the term was mortgaged by the surviving executor—it was held that the legacies were charged on the term, and that the legatees were entitled to priority over the mortgagees.

So in *Humble* v. *Humble* (2), before Lord *Langdale*, real estate devised to trustees for a term for the payment of legacies if the personal estate should be deficient, was held to be subject to the payment of legacies when the personal estate had been wasted by the executors, although at the time of the testator's death it was more than sufficient.

It is true that in these cases the devisees of the estate were the same persons as the executors who wasted the personal estate, but that cannot affect the principle of the decisions, which is directly applicable to the present case. We contend that the time when the sufficiency or insufficiency of the personal estate is to be ascertained is the time when the legacy becomes payable, and when, as here, the legacy is given to an infant, that time must be when the infant attains twenty-one.

Mr. *Southgate*, Q.C., and Mr. *Mouncey-Heysham*, for the Defendants:—

The personal estate having been sufficient at the time of the testator's death for the payment of the legacy, the real estate cannot become liable under the conditions in the will by the subsequent default of the testator's personal representative.

There is no authority directly governing the present case, which is clearly distinguishable from those relied on by the Plaintiff's counsel, where the devisees and executors were the same persons.

(1) 2 Dr. & Sm. 236. (2) 2 Jur. 696.

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But it would appear from several cases very similar to the one now before the Court that the real estate cannot be made chargeable if the personal estate was sufficient at the time of the testator's death.

Thus, in an *Anonymous Case* (1), where an estate was limited to trustees for payment of debts and legacies, and the trustees raised the whole money and applied it to their own use, so that the debts and legacies remained unpaid, it was resolved that the heir was entitled to the land discharged, as being liable for the debts and legacies only, not for the default of the trustees.

The authority of this case was recognised in *Carter* v. *Barnadiston* (2), and in *Omerod* v. *Hardman* (3).

[The MASTER OF THE ROLLS referred to *Lawrence* v. *Blake* (4).]

In *Hepworth* v. *Hill* (5), though it was not necessary to decide the question, yet the law was assumed to be in accordance with the Defendant's contention.

In the present case the executor, by the way in which he filled up the form for the legacy duty, acknowledged that he retained the legacy, thereby making himself a trustee and not an executor, and the testator's estate was thereby discharged. This is clear, from the principles laid down in *Phillipo* v. *Munnings* (6).

Mr. *Fry*, in reply:—

With respect to the contention last raised, I submit that the executor was bound to pay interest on the legacy at 4 per cent. out of the general assets of the testator until the infant attained the age of twenty-one. He could not, therefore, so appropriate the legacy as to make himself a trustee. The executor could only have discharged himself by paying the legacy into Court under the *Legacy Duty Act*, 36 Geo. 3, c. 52, s. 32. Even if the legacy had been appropriated, and from any cause proved deficient at the time of payment, the legatee might go against the real estate: *Gordon* v. *Bowden* (7); *May* v. *Bennett* (8). If from any cause whatever the personal estate proves insufficient for the payment of

(1) 1 Salk. 153.
(2) 1 P. Wms. 505.
(3) 5 Ves. 722, 736.
(4) 8 Cl. & F. 504.
(5) 30 Beav. 476.
(6) 2 My. & Cr. 309.
(7) 6 Madd. 342.
(8) 1 Russ. 370.

the legacy, then when the infant attains twenty-one he is entitled to have his legacy paid out of the real estate.

Nov. 10. LORD ROMILLY, M.R.:—

I have looked very fully into the point raised in this case, and I see no reason to hold that the real estate is liable to pay the legacy in question.

The condition on which the real estate is charged is that the personal estate should be insufficient to pay the legacy. Now if a legacy were given to a person on condition that he should not be in possession of a certain estate at the particular time of the testator's death, he would not be entitled to it if he were then in possession, and it would be immaterial if he ceased to be in possession afterwards. So here a legacy is given payable out of land if the personal estate is deficient at some particular time, and if it is not deficient at that time it is immaterial that it becomes deficient afterwards. All I have to do, then, is to determine the time at which the value of the personal estate is to be estimated. This, therefore, raises the question argued by Mr. *Fry*, as to what was the time for payment of the legacy.

Now the time at which a legacy is payable is not altered in the legal sense of the term because the person entitled to it is an infant. This was a vested legacy from the first, and the legatee, though not entitled to spend it while an infant, was entitled to have it secured; and steps might have been taken for that purpose. But it was not necessary to do so, because the executor in whose hands it was, *William Morton*, was a person of substance, and he admitted that he held the sum on account of the infant, and paid the interest regularly. He died, and his son came into possession of this legacy money and of considerable property besides. In a few years, however, he wasted it all, and was left penniless. No step whatever was taken for the purpose of preserving the legacy when it was found that *James Morton*, after his father's death, was beginning to squander his money, though the present Plaintiff was the father of the infant legatee, and might have taken measures to secure it. This might have been done, indeed, at any time after the testator's death, and

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I must hold that that was the time at which the sufficiency or insufficiency of the personal estate was to be determined. The estate might, no doubt, have become unexpectedly greater or less in value after that time, but as that has not happened, it is immaterial for the present purpose to consider what the consequences might be. The condition on which the legacy was to be payable out of the land has not been fulfilled, and consequently the case fails.

I have examined the cases which were cited, and am of opinion that in those in which the devisee of the land was also the personal representative who wasted the estate, the identity of the two characters prevented them from raising the defence which has succeeded here.

Solicitors for the Plaintiff: Messrs. *Sharp & Ullithorne,* agents for Messrs. *Hodgson & McKeever, Wigton.*

Solicitors for the Defendants: Messrs. *Jennings, White, & Buckston,* agents for Messrs. *S. & S. G. Saul, Carlisle.*

M. R. 1871 *Dec.* 9, 11.

ATTORNEY-GENERAL *v.* FLETCHER.

Will—Construction—Joint Tenancy or Tenancy in Common—"Between."

Under a gift in a will to such of the nephews and nieces of *A.* and the children of *A.*'s deceased niece *B.* thereinafter named (then followed the names of the nephews and nieces and children of the deceased niece), as should be living at the time of the decease of the testatrix, to be divided between and among them *per stirpes* equally and not *per capita*, the children of *B.* taking between them only the equal share to which *B.* would have been entitled if named in that bequest instead of her children, and living at the time of the decease of the testatrix:—

Held, that the children of *B.* took as tenants in common.

THIS was a Petition for payment out of Court of a fund standing to a separate account in the cause, which was bequeathed by the will of *Ann Fletcher,* dated the 5th of April, 1830 (subject to two life interests, both of which had expired) unto such of the nephews and niece of her late husband and the children of his deceased niece *Ann Clarke,* thereinafter named, that is to say (then

followed the names of the nephews and niece and the children of the deceased niece), as should be living at the time of the decease of the testatrix, to be divided between and among them *per stirpes* equally and not *per capita*, the children of the said *Ann Clarke* taking between them only the equal share to which the said *Ann Clarke* would have been entitled if named in that bequest instead of her children, and living at the time of the decease of the testatrix.

The question was, whether the children of *Ann Clarke* took as joint tenants or tenants in common.

Mr. *Davey*, for the Petitioner, a child of *Ann Clarke*, who had survived the determination of both life interests, submitted that the children of *Ann Clarke* took as joint tenants. The direction that the fund should be divided among the parties equally *per stirpes*, only created a tenancy in common as between the children of *Ann Clarke* and the other parties entitled; but did not shew any intention on the part of the testatrix that the children of *Ann Clarke* should themselves take as tenants in common: *Bridge* v. *Yates* (1); *Lanphier* v. *Buck* (2); *Penny* v. *Clarke* (3).

Mr. *F. A. Lewin*, for a Respondent in the same interest, cited *Coe* v. *Bigg* (4); *Leake* v. *Macdowell* (5).

Mr. *Badcock*, for the representatives of a deceased child of *Ann Clarke*, admitted the rule as laid down in the cases cited, but contended that in this case there were double words of severance, viz., "to be divided equally between and among them;" and "taking between them." The use of the word "between" was sufficient to create a tenancy in common: *Lashbrook* v. *Cock* (6).

Mr. *Everitt*, for Respondents in the same interest.

Mr. *Chapman Barber*, and Mr. *Cookson*, for other parties.

Mr. *Davey*, in reply:—

In *Lashbrook* v. *Cock* it was impossible to give effect to the

(1) 12 Sim. 645.
(2) 2 Dr. & Sm. 484.
(3) 1 D. F. & J. 425.
(4) 1 N. R. 536.
(5) 32 Beav. 28.
(6) 2 Mer. 70.

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words "between them" in any other way than by holding that they created a tenancy in common. Here the words are equivalent to "as between themselves," or "*inter se*," neither of which expressions would have constituted a tenancy in common. In giving judgment in *Bridge* v. *Yates* (1) the Vice-Chancellor speaks of persons taking "as joint tenants as between themselves;" shewing clearly that in his opinion the use of the word "between" was not inconsistent with a joint tenancy.

Dec. 11. LORD ROMILLY, M.R.:—

I am of opinion that the children of *Ann Clarke* took as tenants in common. The case of *Lashbrook* v. *Cock* (2) is a distinct authority that the use of the words "between them" creates a tenancy in common, and I believe that I have always followed that decision.

Mr. *Davey* founded an ingenious argument on the language of the Vice-Chancellor *Shadwell*, in giving judgment in *Bridge* v. *Yates*; but all that he there meant to say was that two families might take as between the families as tenants in common, but that when you came to the families themselves, the members of each family took as joint tenants; and I do not think that case affects the matter.

Solicitors: Messrs. *Ellis & Ellis*; Messrs. *Lewin & Co.*; Messrs. *Vizard, Crowder, & Co.*; Messrs. *Merediths, Roberts, & Mills.*

(1) 12 Sim. 645. (2) 2 Mer. 70.

BUBB *v.* YELVERTON.

M. R.
1871
Dec. 13, 14.

[1868 B. 316.]

Will—Legacy to Executor who does not act—Words "my friend P." and "as a remembrance."

Testator appointed his "friend" *P.* his executor, and gave him a legacy "as a remembrance." *P.* did not act as executor:—

Held, that he was entitled to the legacy without proving the will.

THE Marquis of *Hastings*, by his will, dated the 17th of June, 1868, appointed *Hastings Yelverton* and his (the testator's) "friend" *Henry Padwick* trustees and executors of that his will, and gave to each of them a legacy of £1000 "as a remembrance."

The will was proved by *Yelverton* alone, power being reserved to *Padwick* to come in and take out probate.

Padwick had never acted as executor, and was a creditor of the testator's estate in a large amount, which had since been paid off.

A Petition was presented by *Yelverton*, praying, among other things, that the legacies to himself and to *Padwick* might be paid; and the question was, whether *Padwick*, not having proved or acted as executor, was entitled to the legacy.

The *Solicitor-General* (Mr. *Jessel*), and Mr. *C. Hall*, for Mr. *Padwick*:—

This legacy is not given to *Padwick* simply in his character of executor, as he is described as the testator's "friend," and it is said to be given "as a remembrance." When a legacy to executors is accompanied by such words, it is payable whether or not they act in the execution of the will. Thus, in *Burgess* v. *Burgess* (1), a legacy by a testator to trustees and executors as a mark of his respect for them was held not to be revoked by a codicil appointing new trustees and executors with the same legacy as the others. *In re Isabella Denby* (2) was a similar decision; for there a legacy to "my friend. *J. S.*, one of the executors of this my will," was held not to be conditional on his acceptance of the office.

In the present case, if necessary, Mr. *Padwick* submits to prove the will.

(1) 1 Coll. 367. (2) 3 D. F. & J. 350.

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Sir *Roundell Palmer*, Q.C., and Mr. *Pemberton*, for the residuary legatees:—

"Where a legacy is given to an executor, the presumption of law is that it is given to him in his character of executor, and if he does not act, he is not entitled to receive it: *Williams* on Executors (1); *Stackpoole* v. *Howell* (2). In *Read* v. *Devaynes* (3) an executor was held not to be entitled to a legacy without proving the will, though it was expressed to be a mark of gratitude for past favours. In *Burgess* v. *Burgess* (4) the legacy was expressed to be "as a mark of respect," which is a much stronger expression than the words "as a remembrance," which we find here.

Mr. *Southgate*, Q.C., Mr. *Roxburgh*, Q.C., Mr. *Fry*, Q.C., Mr. *C. T. Simpson*, Mr. *Horton Smith*, and Mr. *Kekewich*, for other parties.

Dec. 14. LORD ROMILLY, M.R.:—

I think Mr. *Padwick* is entitled to the legacy. I have looked through the cases on the subject, and I think this legacy was clearly given to him for his own benefit. It is given "as a remembrance." A remembrance of what? A remembrance, I suppose, of his friendship; for the testator calls him his friend, and also makes him an executor. I am of opinion he is entitled to the legacy without proving the will.

Solicitors: Messrs. *Wordsworth, Blake, Harris, & Parson;* Messrs. *Horn & Murray;* Messrs. *Lanfear & Stewart.*

(1) Vol. ii. 4th Ed. p. 1100.
(2) 13 Ves. 417.
(3) 3 Bro. C. C. 95.
(4) 1 Coll. 367.

LONGLEY *v.* LONGLEY.

M. R.
1871
Dec. 18, 19.

[1871 L. 115.]

Will—Construction—Devise and Bequest of Estate and Effects to Trustees, their Heirs, Executors, and Administrators—Trusts applicable to Personalty only—Real Estate—Resulting Trust.

A testator devised and bequeathed all his estate and effects to trustees, their heirs, executors, and administrators, upon trust to convert his personal estate, not being money, and to stand possessed of the money to arise by such sale, and of the rest and residue of his estate and effects upon trust to invest the same in Government or real securities, and to stand possessed of such investments upon trusts for the benefit of the widow and children and brothers and sisters of the testator :—

Held, that the real estate of the testator passed to the trustees, but that the beneficial interest therein was undisposed of by the will, and consequently resulted to the testator's heir.

Dunnage v. *White* (1) followed. *D'Almaine* v. *Moseley* (2) considered.

ARTHUR LONGLEY, by his will, dated the 17th of March, 1856, directed that all his just debts and funeral and testamentary expenses should be paid by his executrix and executors thereinafter appointed as soon as conveniently could be after his decease; and subject thereto he gave, devised, and bequeathed unto his brother *Henry Longley*, and *Richard Hatchett*, all his stock-in-trade, household furniture, plate, linen, china, books, moneys, moneys standing in his name in the funds, book debts, securities for money, policies of insurance, and all sums of money that might be received or recovered thereunder, and all other the estate and effects of which he should be possessed, entitled to, or interested in at the time of his decease, and of whatever nature or kind or wheresoever the same might be; to hold the same and every part thereof unto the said *Henry Longley* and *Richard Hatchett*, their heirs, executors, and administrators, according to the nature and quality thereof respectively, upon the trusts and for the ends, intents, and purposes thereinafter expressed and declared of and concerning the same; that was to say, that they, the said *Henry Longley* and *Richard Hatchett*, or the survivor of them, or the

(1) 1 Jac. & W. 583. (2) 1 Drew, 629.

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heirs, executors, or administrators of such survivor, or other the trustees or trustee for the time being of that his will, should, as conveniently might be after his decease (unless his wife, *Emma Longley*, should wish the same to be carried on as thereinafter mentioned), sell and dispose of his trade or business of a hosier and draper, then carried on by him in *High Street, Southwark*, and of the goodwill thereof, for the most money that could be got for the same, and get in his outstanding debts; and also convert into money all such of his personal estate as should not consist of money; and also make, execute, and perfect, all necessary and proper deeds, writings, and assurances for the purpose of vesting the same in any purchaser or purchasers thereof. And, after declaring that the receipt or receipts of the trustees or trustee for the time being of that his will should be good and valid acquittances to the said purchaser or purchasers for all the moneys expressed in such receipts to be received, and that no such purchaser or purchasers, after paying his, her, or their purchase-money to the said trustees or trustee, or to his or their order, should be answerable for the application, misapplication, or nonapplication thereof, or of any part thereof, he further directed that they, his said trustees, and the survivor of them, and the executors and administrators of such survivor, should stand possessed of and interested in the money to arise by such sale or sales, and also of and in the rest and residue of his estate and effects upon trust to lay out and invest the same in the purchase of Parliamentary stocks or funds of *Great Britain*, or upon real securities at interest, in the names of them, the said trustees, for the time being of that his will; and should alter, change, and vary the same as and when they should think fit; and should stand possessed of and interested in the said stocks, funds, and securities, upon the trusts and for the ends, intents, and purposes, and with, under, and subject to the provisoes, conditions, and declarations thereinafter declared concerning the same—that was to say, upon trust to stand possessed thereof, and to receive the interest, dividends, and annual produce arising from such stocks, funds, and securities, and pay the same to his said wife, *Emma Longley*, during the term of her natural life, or until she married again, whichever should first happen, for her own sole and separate use and benefit; and from and

immediately after the second marriage or decease of his said wife it was his will, and he did thereby direct and declare, that his said trustees or trustee for the time being of that his will should stand possessed of and interested in all and singular the said trust moneys, and the funds and securities upon which the same should be placed or invested upon trust for all and every his children living at the time of such second marriage or decease of his said wife, equally to be divided between them, share and share alike; and if there should be only one such child living at the time of his said wife's second marriage or decease, then he directed that the whole of such stocks, funds, and securities should be for the sole use and benefit of such one child; it was, however, his will and intention that such of his children as were sons should not attain a vested interest in such stocks, funds, and securities before they should respectively attain the age of twenty-one years; and that such of them as were daughters should attain such vested interest therein on attaining their respective ages of twenty-one or on marrying, whichever should first happen; and that until his said children should respectively attain such vested interests, that the said trustees or trustee for the time being of that his will should pay and apply the interest, dividends, and annual produce arising from such trust funds and securities for the maintenance, education, and support of such children; and if there should be only one child then living, the whole for such one child; and he further directed and declared that if, at the time of the second marriage or decease of his said wife, there should be no such child or children living, then he thereby declared that the whole of the trust moneys, funds, and securities should be divided equally between and amongst all his brothers and sisters as should then be living, to be held and enjoyed by them for their own sole and separate use and benefit absolutely: Provided, nevertheless, that if his said wife should be desirous that his said business should be carried on after his decease, then he directed that his said trustees or trustee for the time being should carry on and conduct the same as advantageously as possible for the benefit of his said wife and children, until the decease or second marriage of his said wife, or until the youngest of his children then living should attain the age of twenty-one years: and he further directed and declared

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that the clear profits arising from such business should be applied to and for the sole benefit of his said wife until her decease or second marriage, and afterwards for the benefit of such of his children as should be then living, and after the youngest child should have attained his or her majority (and after the decease or second marriage of his said wife), then he directed that the said business should be sold, and the produce arising from the sale thereof be held by the trustees for the time being of that his will, and applied to and for the benefit of such of his children as should be then living, or if all were dead, for his brothers and sisters then living in a similar manner, and upon the trusts thereinbefore expressed with respect to the trust funds arising from the sale of his stock-in-trade, goodwill, and personal estate and effects, if the same were made immediately after his decease as aforesaid, or such of them as might be then capable of taking effect. And he appointed *Emma Longley*, *Henry Longley*, and *Richard Hatchett*, executrix and executors of his will.

The testator died in January, 1871, leaving two sons, the Plaintiffs, him surviving. He was at the time of his death entitled both to freehold and copyhold estates; and this suit was instituted for the purpose of obtaining the opinion of the Court whether the testator had by his will effectually disposed of the beneficial interest in such real state.

Mr. *Southgate*, Q.C., and Mr. *B. B. Swan*, for the Plaintiffs, who were respectively the heir-at-law and the customary heir of the testator:—

It might be contended on the authority of *Doe* v. *Buckner* (1) and *Doe* v. *Hurrell* (2) that the real estate did not pass by the will, but these cases have been questioned; and the construction for which we contend is, that the real estate passes, but that the beneficial interest is undisposed of, inasmuch as the trusts are exclusively applicable to personalty: *Dunnage* v. *White* (3); *Coard* v. *Holderness* (4). If that be so, there is a resulting trust in favour of the Plaintiffs.

(1) 6 T. R. 610.
(2) 5 B. & A. 18.
(3) 1 Jac. & W. 583.
(4) 20 Beav. 147.

The strongest case against this construction is *D'Almaine* v. *Moseley* (1), where, under a gift of all the residue of a testator's estate and effects upon trust to collect, get in, and recover the same, and invest the same in stock, it was held that real estate passed. The Vice-Chancellor went mainly on the ground that the trusts of the will were as inapplicable to leaseholds as to realty; yet it could not be contended that leaseholds did not pass. It is submitted that this reasoning is unsatisfactory, and does not, at all events, apply to the present case; for here the two trustees are also executors, and the leaseholds would pass to them independently of any gift. Moreover, the testator expressly confines the trust for sale to his personal estate; then he directs the money to arise from the sale and all the residue of his estate and effects (under which words, if at all, the real estate must pass) to be invested in stock. Real estate can be so invested only by selling it; but how is it possible to imply a trust for sale of real estate when the express trust for that purpose is confined to personalty?

Mr. *Oswald,* for trustees.

Mr. *Ramadge,* for the brothers and sisters of the testator, relied mainly on *D'Almaine* v. *Moseley* and *Fullerton* v. *Martin* (2) as answering the argument for the Plaintiffs; and he cited *Patterson* v. *Huddart* (3) and *Lloyd* v. *Lloyd* (4) as shewing that the circumstance that the trusts were less applicable to realty than to personalty had not prevented the Court from holding that the beneficial interest in real estate was effectually disposed of.

Mr. *Southgate,* in reply.

Dec. 19. LORD ROMILLY, M.R.:—

I have carefully gone over this will, and I think that the testator's real estate passed by it. That is shewn by the use of the word "devise" in the gift and the word "heirs" in the limitation to the trustees. But I think the trusts are rigidly and

(1) 1 Drew. 629. 17 Jun 872
(2) 22 L. J. (Ch.) 893; 17 Jur. 778.
(3) 17 Beav. 210.
(4) Law Rep. 7 Eq. 455.

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exclusively applicable to personal estate, and I must, therefore, follow *Dunnage* v. *White* (1), and hold that there is a resulting trust in favour of the Plaintiffs.

Solicitors: Mr. *W. Sturt;* Messrs. *Wilkinson & Howlett.*

M. R. 1871 *Nov.* 18.

BATES *v.* BATES.

[1871 B. 5.]

Practice—Revivor—Death of Sole Plaintiff—Defendant Legal Personal Representative of deceased Plaintiff.

Where a sole Plaintiff dies before decree, and a Defendant becomes his legal personal representative, the common order to revive cannot be made.

THIS was an administration suit; and the sole Plaintiff, who was a beneficiary under the will of the testator in the cause, died before decree, having appointed one of the Defendants (who was also a beneficiary) his sole executor.

Mr. *Freeling,* for the executor, now applied for the common order to revive, citing *Foster* v. *Bonner* (2).

LORD ROMILLY, M.R., considered that a bill was necessary, and refused the application.

Solicitors: Messrs. *Vizard, Crowder, & Co.*

(1) 1 Jac. & W. 583.

(2) 33 L. J. (Ch.) 384.

MOORE *v.* MORRIS.

M. R.
1871
Nov. 25;
Dec. 4.

[1860 M. 193.]

Practice—Administration Suit—Death of Trustee—Representation—15 & 16 *Vict. c.* 86, *s.* 44.

Where one of two trustees of an estate which was being administered in Court died intestate and, as was alleged, insolvent, after a decree for an account against himself and his co-trustee, and after the certificate made in pursuance thereof had been settled by the Chief Clerk, except in some formal particulars:—

Held, that the proceedings ought to be carried on in the absence of a representative of his estate, although considerable balances were proved to be due from the trustees, and although one of the parties having the conduct of the cause was entitled to take out representation to the deceased trustee.

THIS was a suit instituted for the administration of the estate of a testator named *Moore*, of whose will *Paul Moore* and *Eli Morris* were the trustees and executors. *Paul Moore* was also a residuary legatee thereunder.

By the decree, which was made in March, 1861, the usual accounts of the estate were ordered to be taken as against the trustees; and by the order on further consideration in December, 1862, these accounts were directed to be continued.

On the 26th of May, 1871, *Paul Moore* died, intestate, and, as was alleged, insolvent. One of the parties having the conduct of the cause was entitled to take out administration to his estate, but declined to do so.

At the time of the death of *Paul Moore* the Chief Clerk had proceeded to a considerable length with the settlement of his certificate in pursuance of the order on further consideration. It was matter of dispute how much remained to be done. In the opinion of the Court only the date of the certificate, and the amounts of interest calculated up to that date, remained to be filled in. By the certificate considerable balances were found due from the trustees. On the 28th of June, 1871, an order was made at Chambers directing the proceedings to be carried on, notwithstanding the absence of any person representing the estate of *Paul Moore*.

In November, 1871, the cause came on for further consideration,

M. R. 1871 MOORE v. MORRIS.

and the objection was raised on behalf of *Eli Morris* that it ought not to be heard in the absence of a representative of *Paul Moore.* The Court, without hearing any argument, yielded to the objection, and directed the cause to stand over generally, with liberty to apply to restore it.

A motion was now made that the cause might be restored to the paper notwithstanding the absence of a representative of *Paul Moore.*

Sir *R. Baggallay,* Q.C. and Mr. *Shebbeare,* in support of the motion :—

At the time of the death of *Paul Moore* the certificate was all but complete ; what remained to be done was merely matter of form. He has died utterly insolvent, and the objection is raised only to enable the surviving trustee to avoid accounting. It is precisely one of the cases which the enactment 15 & 16 Vict. c. 86, s. 44, was intended to meet.

The MASTER OF THE ROLLS :—I have frequently to consider that section in Chambers, and have always held that that section does not apply in the three following cases : first, where the estate of the deceased person is that which is being administered in the suit ; secondly, where the interest of the deceased person is adverse to that of the Plaintiff ; thirdly, where the representative of the deceased person has active duties to perform.

Sir *R. Baggallay* :—I submit that the second case ought to be taken with this qualification, that relief is sought against the estate of the deceased person. Here we seek relief against the surviving trustee only, and we might have instituted a suit against him alone. *Band* v. *Randle* (1) is a direct authority in support of the application.

Mr. *W. Pearson,* for *Eli Morris* :—

The whole amount of the balances found by the certificate to be due from the trustees jointly is in reality due from *Paul Moore* alone, and the effect of acceding to this application will be that my client will be prevented from recovering the amount paid by

(1) 2 W. R. 331.

him from the estate of his co-trustee. It is true that where there is a joint liability in respect of a liquidated amount, you may proceed against one of the persons jointly liable, but where an account has to be taken all the persons liable must be parties to the suit, which being begun against all must be prosecuted against all. The certificate was not complete at the time of *Paul Moore's* death; in fact proceedings for the purpose of shewing the inaccuracy of some of the Chief Clerk's findings were pending. Moreover, *Paul Moore* is entitled to a share of the residue of that estate, and that must be applied in making good any funds coming to him. Under these circumstances the proceeding is adverse to *Paul Moore's* estate, and the Court ought not either to allow the suit to go on in the absence of a representative, or to appoint a person to be representative. Such a representative would not be the true legal personal representative of the estate. As to *Band* v. *Randle* (1), in that case it was found impossible to find a representative; here one of the persons having the conduct of the proceedings might take out letters of administration.

The MASTER OF THE ROLLS said that he thought the case was within the statute, but that the proper course was to appoint some one to represent the estate.

Sir *R. Baggallay*, in reply:—

In all cases where the Court has power to appoint a person to represent an estate, it may also allow the proceedings to go on in the absence of a representative. Here the appointment of a representative can only lead to expense and delay without any result. As to the suggestion that anything will be coming to *Paul Moore's* estate in this suit, it is only too clear that the testator's estate will be insufficient for payment of the pecuniary legatees in full.

Dec. 4. LORD ROMILLY, M.R., after stating the facts, continued:—

I am of opinion that the order of the 28th of June, 1871, which is the substantial matter in question, was correctly made. I think that this is shewn by the case of *Band* v. *Randle*, and I am further

(1) 2 W. R. 331.

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of opinion that it is the most convenient course to follow, and does no harm to any one. If *Paul Moore* has left any property, any one may take out administration to his estate. Mr. *Morris* may do so, and in that event he will get repaid all that he may have to pay in this suit. But if *Moore* has left no estate, it would simply be waste of money to appoint any one to represent him; it would neither be in the interest of the Plaintiff nor of any one else to make an appointment from which no result could follow. Moreover, in all these cases delay is to be avoided. Some one will have to pay one day, and delay does not ultimately benefit him, and it does harm to every one else.

I think, therefore, that the cause must be restored to its place in the paper.

Solicitors: Messrs. *Walker & Sons;* Mr. *Letts*, jun.

M. R. 1871 Dec. 4.

In re RICHARDSON.

Land Registry Act (25 & 26 *Vict.* c. 53), s. 17—*Indefeasible Title—Mortgagor with indefeasible Title—Purchase from Mortgagee—Form of Order.*

The order made in *In re Richardson* (1) varied.

IN this case Mr. *Thomas Richardson* had purchased from the first mortgagee of an owner registered with an indefeasible title, and the Master of the Rolls had directed that *Thomas Richardson* should be registered as owner with indefeasible title in the same manner as if he had purchased from the former registered owner, without his (the former owner) having created any incumbrances subsequent to the mortgage to the mortgagee selling to *Thomas Richardson.* The order then proceeded: "But his Lordship doth not direct any alteration to be made in the record of incumbrances." See the case reported (1).

Mr. *Caldecott* now mentioned the case, and stated that the Chief Registrar considered that the effect of the last words in the order

(1) Law Rep. 12 Eq. 398.

was to compel him to enter the subsequent mortgages created by the mortgagor against Mr. *Richardson's* title; and thus the earlier part of the order would be rendered nugatory.

LORD ROMILLY, M.R., directed the order to be amended by striking out the words, "But his Lordship," &c.

Solicitors: Messrs. *Van Sandau & Cumming.*

V.-C. M.
1871
Nov. 24.

PENNOCK *v.* PENNOCK.

[1869 P. 181.]

Will—Construction—"Property" or "Power"—"Power to take and apply."

13 L.D. 146
14 L.D. 263

A testatrix having a power under a marriage settlement to appoint certain shares of real estate made an appointment to her husband "in trust to stand possessed thereof, and to enjoy the rents, profits, and income arising and to arise therefrom for his own absolute use and benefit, for and during the term of his natural life, with power to take and apply the whole or any part of the capital arising therefrom to and for his own benefit, and from and after the decease of my said husband," over:—

Held, that the husband took a life interest with a power of appointment, and that, on his death without having exercised the power, the gift over took effect.

ROBERT KITCHING, who died on the 21st of June, 1865, by his will, dated the 19th of December, 1863, gave one eighth share of his residuary real and personal estate in trust for his cousin *Hannah Hurst*, the wife of *John Hurst*, her heirs, executors, administrators, and assigns.

By an indenture dated the 5th of July, 1869, and made between *Hannah Hurst* and *John Hurst* of the one part, and *William Watson* of the other part, and duly acknowledged by *Hannah Hurst*, the eighth share of *Hannah Hurst* in the testator's real estate, and a ninth part of another eighth share which had devolved upon her, were conveyed to *William Watson* and his heirs, to such uses as *Hannah Hurst* during her then or any future coverture should by deed or will appoint.

Hannah Hurst by her will, dated the 4th of January, 1870, after reciting the indenture of the 5th of July, 1869, proceeded as follows: "Now I, the said *Hannah Hurst*, by virtue and in exercise of the said power and authority given to me by the said in part recited indenture of the 5th day of July, 1869, and all other powers or authorities enabling me, do hereby direct, limit, and appoint all the said parts and shares of and in the said messuages, cottages, farms, closes, lands, tithes, hereditaments, and real estate, which I have power to direct, limit, and appoint, by virtue of the before-mentioned indenture, unto my said husband *John Hurst*, his

heirs, executors, administrators, and assigns, in trust to stand possessed thereof, and to enjoy the rents, profits, and income arising and to arise therefrom, for his own absolute use for and during the term of his natural life, with power to take and apply the whole or any part of the capital arising therefrom to and for his own benefit; and from and after the decease of my said husband I direct the same, subject as aforesaid, to be equally divided amongst such of my nephews and nieces as shall be then living, and the two children of my late nephew *Joshua*, they taking one share equally between them; and I give to my said husband full power to sell my said estates, either together or in parcels, by public auction or private contract, and subject to any special conditions of sale or otherwise, and to give good discharges and receipts for all moneys he may receive."

A suit was instituted for the administration of the estate of *Robert Kitching*, and under the decree, dated the 29th of January, 1870, his real estate not specifically devised was sold and the proceeds paid into Court.

Hannah Hurst died on the 9th of June, 1870, and *John Hurst* died on the 23rd of June, 1870, intestate, and without having made any appointment under his wife's will, and in pursuance of the order on further consideration dated the 1st of August, 1871, £1327 6*s.* 5*d.* 3 per cents., and £80 5*s.* 1*d.* cash, which together represented the shares of *Hannah Hurst*, were carried to a separate account.

A petition was now presented on behalf of the nephews and nieces to have the fund paid out to them.

Mr. *Glasse*, Q.C. (Mr. *Nalder* with him), for the Petitioners:—

The fund represents real estate, and the will must be construed accordingly; and as there is a life estate by express words, the expressions following must be taken in their literal meaning, as giving only a power of appointment, with a gift over to the nephews and nieces in default of appointment: *Reith* v. *Seymour* (1); *Doe* v. *Glover* (2); *Bradley* v. *Westcott* (3).

Mr. *Glasse* was then stopped by the Court.

(1) 4 Russ. 263. (2) 1 C. B. 448.

(3) 13 Ves. 445, 453.

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PENNOCK v. PENNOCK.

Mr. *Pearson*, Q.C., and Mr. *Marten*, for the heir-at-law of the husband:—

It is important to bear in mind the distinction between "property" and "power." The question is, whether upon the authorities the words are to be treated as giving property, for if so the whole was given to the husband, and the gift over cannot take effect. *Doe* v. *Glover* (1) has been overruled by *Holmes* v. *Godson* (2), which upheld *Gulliver* v. *Vaux* (3), and has been followed in *Nowlan* v. *Walsh* (4); and it is now settled that where, after a life estate or life interest, words are added which import a general power of disposition over the entire interest in the property, the property, and not a power only, is given, and a gift over cannot take effect. In *In re Maxwell's Will* (5) the words were "power to dispose of," and the words here—"power to take and apply"—are at least as strong; and *In re David's Trusts* (6) and *Weale* v. *Ollive* (7), the latest authorities are to the same effect. *Bradley* v. *Westcott* (8) was a case of a limited power to appoint by will. The absolute interest being thus conferred, the gift over is necessarily void: *Barton* v. *Barton* (9); *In re Mortlock's Trust* (10).

Mr. *Edwards*, and Mr. *J. T. Humphry*, for parties representing the share of a nephew.

SIR R. MALINS, V.C.:—

This is a question of construction arising upon the will of a married woman, made in exercise of a power conferred upon her by her marriage settlement. It is admitted that the fact that the testatrix gave the property to her husband as trustee in the first instance does not affect the application of the rules of construction. [His Honour then read the part of the will above set out, and continued:—] I have been referred to several cases, such as *Holmes* v. *Godson*, *Nowlan* v. *Walsh*, and *Re Maxwell's Will*, which shew that where there is a gift in words such as

(1) 1 C. B. 448.
(2) 8 D. M. & G. 152.
(3) Ibid. 167, n.
(4) 4 De G. & Sm. 584.
(5) 24 Beav. 246.
(6) Joh. 495.
(7) 32 Beav. 421.
(8) 13 Ves. 445, 453.
(9) 3 K. & J. 512.
(10) Ibid. 456.

are considered to confer an absolute interest, with a gift over in case of the death of the person in whose favour the gift is made, such a gift over is void. In such cases it has been most reasonably held that the power of making a testamentary disposition was a necessary incident of property, and a gift over could not be made to depend upon the happening of that event. If the gift here had been "with power to appoint by deed or will," and in default of appointment to the nephews and nieces the case would have been clear; but it is said that if the testatrix had meant that she would have said so. But I think she has expressed the same thing in very felicitous language, and in fewer words. It might also be asked why, if she intended an absolute gift, she expressed it to be for life only, and with perfect consistency followed it by a power of appointment and a gift over "from and after the decease" of her husband. It is argued that I must apply a strict rule of construction, and treat all those expressions as vain; but I am of opinion that the whole clause must be taken together as it stands; and that the husband had a life estate, with a power to acquire the entire interest if he wanted it, but that if he did not acquire it there was a gift over to the nephews and nieces. The result was that he died without doing anything to acquire the absolute interest, and the gift over must take effect.

Amongst the cases cited, *In re Maxwell's Will* (1) was very much pressed upon me. There a testator, after giving a fund to his son for life, and afterwards, in case of the son's death, leaving lawful issue, directing his executors to pay the fund to the son's surviving children, continued: "But if he should die without lawful issue, I give and bequeath a moiety of the said capital stock to be disposed of as my said son shall think proper;" and the son having died without issue, that was held to be an absolute gift of the moiety. That would also have been my construction of the words, and I think them perfectly clear. That case is certainly in accordance with *Bradley* v. *Westcott* (2), and consistent with *Reith* v. *Seymour* (3), which I do not find adverted to in any of the other cases cited; and the distinction between it and the present case is perfectly clear. In it there were words *primâ facie* importing a

(1) 24 Beav. 246.
(2) 13 Ves. 445.
(3) 4 Russ. 263.

V.-C. M. 1871 PENNOCK v. PENNOCK.

gift of the absolute interest, but here there are no words of gift beyond those applying to the life estate. I am, therefore, of opinion that the husband took a life estate only, with a power over the fee simple, and that the gift to the nephews and nieces takes effect.

Solicitors: Messrs. *Collyer-Bristow, Withers, & Russell;* Messrs. *Lever & Son;* Messrs. *Milne, Riddle, & Mellor.*

V.-C. M. 1871 *Dec.* 4, 5.

In re IMPERIAL LAND COMPANY OF MARSEILLES.

TOWNSEND'S CASE.

Contract to take Shares—Letter of Allotment Posted, but not Received—Erroneous Address given by the Applicant.

A. applied for shares in a company. Shares were allotted on the 15th of March, 1866, and the letter of allotment posted on the 16th, but owing to the applicant having omitted to add the name of the post town "*Dublin*" to his address, the letter miscarried, and was returned to the company, who immediately forwarded it through the brokers at *Dublin* on the 20th of March. The letter was delivered on the 21st, but in the meantime the applicant had written on the 20th a revocation of his application for shares, and subsequently repudiated the allotment, and demanded a return of his deposit. No steps were taken by *A.* to have his name removed from the register of shareholders, and calls made by the company were not enforced against him:—

Held, that the miscarriage of the first letter of allotment being caused by the incorrect address furnished by *A.* himself, the contract was complete at the time when, but for *A.*'s fault, the letter would have been delivered:

Held, also, that the letter posted on the 20th of March was posted within a reasonable time, and was a good notice of allotment; and that *A.* was a contributory.

THIS was a motion on behalf of the liquidators of the *Imperial Land Company of Marseilles, Limited*, that an order removing the name of *Joseph Henry Townsend* from the list of contributories under the winding-up of the company might be discharged.

Townsend was a solicitor living at No. 36, *Westland Row, Dublin.*

On the 6th of March, 1866, he applied in writing, through his brokers, Messrs. *Woodlock & O'Donnell*, of *Dublin*, for an allotment of thirty shares in the company, or any smaller number which might be allotted to him; and this was accompanied by payment of £30, being a deposit of £1 per share on the allotment. The

application was made upon the printed form used by the company, which contained the usual direction that the name and address of the applicant should be stated in full. *Townsend*, upon filling in this form, had stated his address to be 36, *Westland Row*, the word "*Dublin*" being omitted.

On the 15th of March fifteen shares in the company were allotted to *Townsend*, and the letter of allotment was posted between the hours of four and six in the morning of the 16th of March, and addressed to No. 36, *Westland Row*. In consequence of the omission of the word "*Dublin*," the letter was returned through the post to the secretary of the company on the 20th of March, and on the same day the allotment letter was enclosed to Messrs. *Woodlock & O'Donnell*, with a letter requesting them to forward it to *Townsend*. This was accordingly done, and the letter was delivered to *Townsend* on the 21st of March. In the meantime *Townsend*, not having received any allotment, wrote a letter to the company, which was posted on the 20th of March, in which he withdrew his application for shares, and requested a return of his deposit; he subsequently repudiated the allotment, and declined to accept the shares. The letter of allotment was returned by the brokers to the company.

The resolution for winding up the company voluntarily was passed on the 5th of September, 1869. During the whole of this time *Townsend's* name remained upon the register of shareholders. The calls made by the company were not enforced against him, and although he threatened to bring an action against the company for a return of his deposit, no proceedings were, in fact, commenced by him, nor were any steps taken to remove his name from the register until after the winding-up, when a summons in Chambers was taken out for that purpose. An order was made for removing his name from the list, and the liquidators now moved to discharge that order.

Mr. *Glasse*, Q.C., and Mr. *Higgins*, in support of the motion:—

The application by *Townsend* for shares, and the allotment, constituted a contract which was completed upon the notice of allotment being posted to the applicant: *Duncan* v. *Topham* (1);

(1) 8 C. B. 225.

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Dunlop v. *Higgins* (1). A person is not answerable for casualties occurring at the post-office. The posting of a letter declaring the acceptance is sufficient, notwithstanding that the letter does not arrive. It was not even necessary in this case that a letter should be posted, so long as the allotment was made, and the name of the applicant entered upon the register of shareholders. Suppose a person applied for shares and paid his deposit without giving his address, there it would be impossible to post a letter containing notice of the allotment, but nevertheless the applicant would be bound. An offer by letter to take shares is a continual offer day by day until it is accepted, and when accepted it is binding: *Chitty* on Contracts (2); *Adams* v. *Lindsell* (3); *Tuckers Case* (4). In this case, however, the address was given, and the company were bound to use the address stated by the applicant himself. It was not incumbent upon the company to find out in what part of the kingdom *Westland Row* might be situate. They did all they could do under the circumstances, and if the applicant had given his full address, as he was bound to do under the terms of the company's circular, the letter would have been delivered on the 17th of March. If the allotment was not good on the 16th, it was so on the 20th of March. From that date Mr. *Townsend* knew that his name was on the register of shareholders, and it was his duty to take proceedings immediately to enforce its removal; but no such proceedings were taken till after the order for winding up was in force. If he had any case for removing his name before the winding-up, he certainly had none afterwards: *In re Cleveland Iron Company* (5).

Mr. *Cotton*, Q.C., and Mr. *Locock Webb*, for Mr. *Townsend*:—

We submit that there was no omission on the part of Mr. *Townsend* in giving his proper address, and that the company had ample means of finding out that *Westland Row* was in *Dublin*. The application for shares was made through Messrs. *Woodlock & O'Donnell*, who were brokers of *Dublin*, and the form of application was impressed with their stamp. The letter was posted

(1) 1 H. L. C. 381.
(2) 5th Ed. p. 12.
(3) 1 B. & A. 681.
(4) 20 W. R. 88. WN (1871) 209
(5) 16 W. R. 95. WN (1867) 256

at *Dublin*, and the deposit was paid into a bank at *Dublin* which was authorized to receive deposits for the company. But apart from this, it appears that all the shareholders in the *Crédit Foncier of England* were entitled to shares in this company, and it was by reason of Mr. *Townsend* being a shareholder in the *Crédit Foncier* that this allotment of shares was made to him; consequently the company, by reference to the list of shareholders in the *Crédit Foncier*, might have ascertained his address to a certainty.

There is no authority to shew that a contract is complete upon the mere fact of the letter of allotment being posted. It must be proved that the letter was also received: *British and American Telegraph Company* v. *Colson* (1), where a letter was not received by some confusion in the numbers on the houses in the street; and *Ward's Case* (2), *Reidpath's Case* (3), *Hebb's Case* (4), and *Finucane's Case* (5).

The case of *Dunlop* v. *Higgins* (6) does not shew that a party is bound when the letter is posted. The circumstances of that case were peculiar. The post was delayed by an accident created by frost, and the terms of the contract were that it should be accepted in due course of post, or by return of post.

The contract, therefore, not being complete until the receipt of the letter of allotment, there was no valid contract effected by the letter which was posted on the 16th of March. When this letter was returned to the company by the Post Office there was ample opportunity for them to ascertain Mr. *Townsend's* address; but even then the second letter was not addressed to him, but to the brokers, and it was not delivered until after Mr. *Townsend's* letter of revocation had been received by the company. The second letter was consequently too late; and under any circumstances the contract was not binding upon Mr. *Townsend*.

From that time to the date of the winding-up order no steps were taken by the company to enforce the contract. Mr. *Townsend* was not required to pay the calls, and although he could not obtain a return of his deposit, there was no reason why he should have taken any further proceedings against the company to have

(1) Law Rep. 6 Ex. 108.
(2) Ibid. 10 Eq. 659.
(3) Ibid. 11 Eq. 86.
(4) Law Rep. 4 Eq. 9.
(5) 17 W. R. 813.
(6) 1 H. L. C. 381.

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his name removed from the register of shareholders if it had ever been put on. He might well suppose that his name was not upon the register when the calls made upon other shareholders were not enforced against him. This laches on the part of the company was sufficient to preclude them from substantiating the present case, and Mr. *Townsend's* name ought now to be omitted from the list of contributories.

SIR R. MALINS, V.C., after stating the facts of the case, continued:—

It appears there were about 2000 letters of allotment to be issued by this company, and as it is usual to send the letters as soon after the allotment was made as possible, there would necessarily be a great pressure in the office. The object, therefore, in requiring the name and address of each applicant to be stated in full is that the clerks should have nothing to look at but the address given in the form of application for shares; and in this case Mr. *Townsend's* address was correctly copied upon the letter which was posted to him, and the letter, being posted in *London* with no town attached to it, would naturally be a *London* letter. *Westland Row,* however, was not found in *London,* and the letter was returned by the Post Office, and subsequently forwarded to the *Dublin* brokers, through whom the application for shares was made, and was immediately handed by them to *Townsend,* and admitted by him to have been received on the 21st of March. But *Townsend,* not having received the letter as early as other persons who were applicants at the same time with himself, wrote on the 20th of that month to the secretary of the company withdrawing his application and requiring his deposit to be repaid. It is clear, beyond all doubt, that if the word "*Dublin*" had been added to the address, 36, *Westland Row,* the letter of allotment would have been received by Mr. *Townsend* on the 17th of March. To whom, then, is the blame attributable that he did not regularly receive his letter? Most undoubtedly it was owing to an omission on his own part. Being a professional man—a solicitor in *Dublin*—I should have expected when it was explained to him that it was his own omission to put the proper address, that his attempt would have been, not to wriggle out of the liability upon the shares, but to have said

at once that as it was his own fault in not adding "*Dublin*" to his address, he would put the company in the same situation as if his application had been filled up properly, and that he would treat this letter as if it had been received on the 17th; that would have been the conduct of a man of honour, but it was not the idea of Mr. *Townsend*, for he attempted to avail himself of his own error to raise a contest with the company whether they were to return his deposit, and by his own default take advantage and get his money back, and so be in the same situation as if he had never applied for the shares at all.

I have had a very lengthened argument turning very much upon nice points of law, and I have now to decide upon them. I am bound to say, taking all the cases together, I do not think the law admits of much doubt. It is, I apprehend, perfectly clear that to constitute a contract, or to take shares in a company, there must be an application for the shares, and there must be an allotment and a communication of the allotment to the applicant. Further, the law seems to be, and I think reasonably so, that it is not sufficient that the letter should have been posted to the applicant informing him of the allotment, but it must be received by him. That is settled by several cases. There are two or three instances of it. I need not do more than refer to the case of the *American Telegraph Company* v. *Colson* (1), which decides that although the letter may have been posted to the applicant informing him of the allotment having been made, if, in consequence of a confusion in the numbers in the street, or from any other cause not attributable to the applicant, the letter does not reach him, he is to be considered as if it had never been sent to him at all. I apprehend no case has decided, nor do I think any case ought to decide, that a man is to be considered in the same position as if he had not received it where the non-receipt of it is attributable to his own fault. In this case he would have received the letter if he had complied with that which the form of application imposed upon him, namely, the obligation to give his address in full. Suppose the form had been, "I apply for these shares, and a letter addressed to me as under informing me of an allotment will be sufficient;" would not that be clearly binding on him? It is

(1) Law Rep. 6 Ex. 108.

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admitted if that had been the form, he would have been bound. No doubt he does not say so in words, but in substance it is identical. The company invite persons who wish to have shares to apply for them, and to give their addresses; he does not give the correct address. I think it is distinctly implied that a letter sent to the address which he gives shall be a letter taken as having been sent to him. Suppose this case: what an injustice it would be if a man might, by giving a false address or by omitting part of his address, get out of the liability that would otherwise fall upon him. The question here is, to whom is the default to be attributed? To whom can it be attributed but to Mr. *Townsend* himself?

A lengthened argument has taken place to shew that the company might, by research, have found out where he lived. First of all, it is said he was a shareholder in the *Crédit Foncier and Mobilier of England, Limited*, and the secretary was the secretary of the one company and the other, and therefore Mr. *Lowe* might have known and supplied the word "*Dublin*." Then, again, it is said that there was the name of a *Dublin* broker upon the application for shares, and if they had looked at the stamps upon it they would have seen that it came from *Dublin*, and therefore it ought to have been filled up with "*Dublin*," after *Westland Row*. I think the answer to that is very obvious. All this business is transacted in a great hurry; the clerks have not time to look and see where every man lives, therefore it is incumbent on each applicant to give his address; and it amounts to a contract that if the letter is duly posted to the address that he gives, then it is a notice to him; and as he gave *Westland Row* only, I consider it as good a notice to him as if he had added the word "*Dublin*," and it had reached *Dublin*.

Now, is there any authority upon the subject? Many cases have been cited, and I cannot help thinking the case of *Adams* v. *Lindsell* (1) is, after all, the authority most applicable to this case. It is one very fully commented upon by Chief Baron *Kelly* in the *American Telegraph Company* v. *Colson* (2). It is a very short and plain case. The person who desires to sell goods writes to the person proposing to buy them, offering them at a certain price on receiving a reply by return of post. The proposed buyer lived at

(1) 1 B. & A. 681.

(2) Law Rep. 6 Ex. 108.

Bromsgrove, which is a well known town in the county of *Worcester.* The seller directed the letter to *Bromsgrove, Leicestershire,* the consequence of which was that the letter, instead of arriving the next day, was delayed two days; and then the receiver of the letter wrote and accepted the offer. The question was, whether that was a binding offer. Now, it is perfectly clear if it meant that the answer should be received by return of post it was not so, and there was no binding contract; but if it meant an answer as soon as our conduct will enable you to give an answer, then the condition was satisfied as the man did not get the letter till the third day, when he answered it, accepting the offer. The question was in whom the fault lay.

In *Adams* v. *Lindsell* (1) the Court said: "The Defendants must be considered in law, as making, during every instant of the time their letter was travelling, the same identical offer to the Plaintiffs; and then the contract is completed by the acceptance of it by the latter. Then as to the delay in notifying the acceptance, that arises entirely from the mistake of the Defendants, and it therefore must be taken as against them that the Plaintiffs' answer was received in course of post." I say in similar words in this case, the delay was caused entirely by the omission of Mr. *Townsend,* to put his proper address in the letter. He has, in my opinion, contracted with the company that a letter addressed to him at a place which he gives as his address shall be a duly posted letter; and he who has caused the mistake is not the person entitled to take advantage of it.

That, in my opinion, completely disposes of the case; but in order to take away all possibility of excuse, as soon as the company got back the letter which was returned by the Post Office, they took this course—I do not think it was the best course that might have been taken, because I think then the bustle and confusion of posting all these letters having been got over they might have said: "this is a *Crédit Foncier* shareholder; let us look at the books and see what his address is;" and they might have supplied the word "*Dublin,*" but they did not do so—finding the name of the brokers through whom he had paid the deposit into the bank upon the letter, they sent a letter upon the 20th to those brokers, requesting them to forward it to Mr. *Townsend;* and the letter

(1) 1 B. & A. 683.

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arriving on the 21st, an hour or two afterwards, was handed by them to Mr. *Townsend*, and upon the 21st Mr. *Townsend* gets the letter of allotment. I repeat that upon that occasion Mr. *Townsend* ought at once to have admitted that the mistake had arisen through his own fault, and that he would be the last to take advantage of his own omission in not giving his proper address.

Then it is argued that before the letter of the 20th was sent he had retracted. Upon that subject I am by no means satisfied. The letter of the company was posted in *London* on the 20th, and was sent to him directly it reached *Dublin* upon the 21st, and his letter reached the company upon the 21st. The cases all concur in this, that the letter becomes the property of the person to whom it is sent when once put into the post, provided it is afterwards received, and the letter being posted in *London* upon the 20th, was, at any rate, a good allotment on that day. I am clearly of opinion that there was a good allotment upon the 16th, although the 20th was within reasonable time; and the second letter having been received by him on the 21st, I must consider at all events that it was a notification to him of the allotment.

But then it is said that he had countermanded it on the same day. Now I have not a particle of evidence to shew which of the two letters was posted first, and I think I am bound to hold that it is incumbent on Mr. *Townsend* to shew that his letter was posted before theirs. That has not been done, and I shall assume that their letter was posted before his in *Dublin;* and therefore I decide against Mr. *Townsend*—first, upon the ground I have already stated, that the letter of the 16th, being directed to the address he had given, was a good letter of allotment to him; and secondly, if that had failed, at all events the letter of the 20th was a good notice of the allotment; and in my opinion upon every ground he is bound by that letter of allotment.

Another topic was, that there has been great delay; and at one time I was rather inclined to think there was something in that point. All this took place in March, 1866, and the company was not wound up till September, 1867. Now if the company had acquiesced in the repudiation of his shares all that time, there might have been a good deal in the argument that it was too long; but it turns out that up to a very late period there were

demands on one side and resistance on the other, he threatening to bring an action for the return of the deposit, which he never did, and they throughout insisting that he should pay the calls made upon the shares, so that there was not on either side a retreat from the battle; the company were making demands against him and he was resisting them, therefore I am of opinion that the delay is not fatal to the official liquidator; and, looking at all the circumstances, and considering the many other persons put upon the list who are obliged to contribute, I am unable to see that Mr. *Townsend* has brought himself within any ground upon which he ought to be relieved from that liability which he would have incurred if his right address had been given; and therefore his name must be retained upon the list of contributories.

Mr. *Glasse* asked for the costs of this application, and also the costs in Chambers, against Mr. *Townsend*.

THE VICE-CHANCELLOR:—I think Mr. *Townsend* must pay the costs in Chambers and here also, as my opinion is that he is in the wrong.

Solicitors for the Liquidators: Messrs. *G. S. & H. Brandon.*
Solicitors for Mr. *Townsend*: Messrs. *De Jersey & Micklen.*

V.-C. B.
1871
Nov. 8.

HEYMAN *v.* DUBOIS.

[1868 H. 250.]

Principal and Surety—Marshalling Securities.

A. having effected policies upon his own life with an assurance office, mortgaged them to the office as a security for successive loans. In one of these mortgages *B.* became surety for repayment of the amount borrowed. *A.* subsequently became bankrupt, and *B.* was compelled as surety to pay part of the debt.

Upon *A.*'s death :—

Held, as against *A.*'s assignee in bankruptcy, that *B.* was entitled to marshal the securities so as to obtain repayment out of the balance of the several policy moneys of the amount which he had been compelled as surety to pay :

Held, also, that a payment to *B.* by *A.*'s wife, out of the income of her separate estate, to reimburse him for the loss he had sustained, was not a payment on account of or as agent of *A.*, so as to set free the policies *pro tanto* from *B.*'s claim.

PLAINTIFF being a surety for the debt incurred by a policy-holder on a mortgage to an assurance company of certain policies effected with them, sought by his bill to recover out of the balance of the proceeds of the policies paid into Court after the death of the policy-holder the amount which he had been compelled to pay in an action brought against him as a surety by the company.

On the 19th of February, 1863, *J. E. Tyrie* effected a policy (9322) for £2000 on his own life with the *Sovereign Life Assurance Company*, and on the 21st of February mortgaged the policy to the office as security for a loan of £1000.

On the 10th of October, 1863, *Tyrie* effected a second policy (9695) for £1000 with the *Sovereign Office*, and on the 12th of October mortgaged it to the office for £500.

On the 14th of January, 1865, *Tyrie* effected a further policy for £1000 (10,688), and on the 16th of January mortgaged this policy, together with policy 9322, to the office for £1500. In this last mortgage the Plaintiff and one *Boyle*, who soon afterwards became bankrupt, became sureties for the repayment of the amount thereby secured.

In July, 1865, *Tyrie* became bankrupt. In September, 1865,

the company sued Plaintiff as one of the sureties, and judgment was recovered against him for £1500 and costs. The Plaintiff had paid the company £975 16*s.* 10*d.* in part discharge of the judgment, and £24 3*s.* 2*d.* for costs. It appeared that policy 10,688 was forfeited for non-payment of the premium, and that policy 9332 became liable to forfeiture for the same reason; but in that case the policy was allowed to be reinstated upon payment by Plaintiff of the premium and interest.

On the death of *Tyrie* in September, 1867, two sums of £2000 and £1000 became payable to his assignee from the office, in respect of the two subsisting policies (9322, 9695), subject to repayment of the advances made by the company. After discharging these mortgages there remained a balance of £795 11*s.* 10*d.* due upon the policies, and to establish a charge on this balance to the extent of the money which had been recovered from him as surety the Plaintiff had filed his bill, submitting that inasmuch as on taking the accounts the balance of the moneys payable in respect of policy 9322 would not, it was apprehended, be found sufficient to satisfy the charge claimed by him, he was entitled, as against *Tyrie's* assignee in bankruptcy, to have the moneys payable in respect of both policies marshalled, so as to give him the benefit of the balance of policy 9695, after satisfaction of the company's charge thereon.

It appeared, from Plaintiff's answer and his affidavit, that on the 13th of September, 1866, he received, through his solicitor, from the wife of *J. E. Tyrie* a sum of £400, and in August, 1867, a further sum of £50. These sums, as Plaintiff was informed, were derived from the income of Mrs. *Tyrie's* separate estate independently of her husband, and he understood that the motive of her paying such sums to him was to reimburse to him (so far as they would extend) the money which she was aware Plaintiff had been compelled to pay, and had paid, as surety for her husband. Nothing was said about Mrs. *Tyrie* giving him (Plaintiff) these sums for or on behalf of her husband, or with the view of setting free for the benefit of his estate any security held by Plaintiff in respect of the payments which he had made. "On the contrary, I distinctly understood that the said gifts to me constituted a transaction in which no one but herself and I were concerned, and I believe that

V.-C. B. 1871 HEYMAN v. DUBOIS.

she made such payment or gift in discharge of what she thought a moral obligation, and not for the purpose of satisfying the liability of the said *J. E. Tyrie* upon the judgment" which was recovered by or on behalf of the company against Plaintiff and not against *Tyrie*.

The Plaintiff also stated his belief that Mrs. *Tyrie* did not either directly or indirectly pay the money either wholly or partly for the purpose of satisfying the liability of her husband upon such judgment, but that she paid such sums solely for the purpose of relieving him (the Plaintiff), as far as she could, from the inconvenience to which he was personally subjected by reason of his having become surety for her husband. The answer (of Plaintiff) also submitted that under the circumstances Mrs. *Tyrie* acquired an interest in the securities to the benefit of which he claimed to be entitled, and that he (Plaintiff) was bound to prosecute the suit, for the purpose not only of recovering the balance due to himself, but of making such securities, so far as they would extend, available for repaying her the sums so advanced out of her separate estate with interest.

Mr. *Kay*, Q.C., and Mr. *Westlake*, for the Plaintiff, contended that a surety who had paid off the debt for which he became answerable was entitled to stand in the place of the creditor, and to all the equities which the creditor could have enforced, not merely against the principal debtor but also against all persons claiming under him. As against *Tyrie's* assignee, the company as creditors, would have had the right to consolidate these securities and retain their debt out of either policy; and accordingly the Plaintiff was entitled to have the securities marshalled and to be paid the whole amount which he had been compelled to pay as surety, before anything was paid to the assignee in respect of either policy: *Drew* v. *Lockitt* (1); *Wright* v. *Morley* (2); *Newton* v. *Chorlton* (3).

Mr. *Amphlett*, Q.C., for *Tyrie's* assignee, took the objection that Mrs. *Tyrie* ought to be a party to the suit, as she had reimbursed Plaintiff what he had been compelled to pay on behalf of her hus-

(1) 32 Beav. 499. (2) 11 Ves. 12, 22.
(3) 10 Hare, 646.

band, and she was a *cestui que trust* to that extent of any moneys that might be recovered in this suit.

Mr. *Kay*:—

The payment by Mrs. *Tyrie*, was a merely voluntary payment on her part, to reimburse Plaintiff for the loss he had been put to, and was in no sense a payment in the name or on behalf of her husband's assignee, so that he could afterwards adopt it or affect Plaintiff's rights. Where a person does not intend to act as an agent, there is no authority for holding that defect of intention as well as defect of authority can be cured; and the benefit of Mrs. *Tyrie's* payment cannot be claimed by her husband's assignees in exoneration *pro tanto* of the policy moneys any more than if the payment had been made by an entire stranger.

[They cited upon this point *Walter* v. *James* (1).]

Mr. *Amphlett*, Q.C., and Mr. *J. Simmonds*, for *Tyrie's* assignee in bankruptcy:—

The Plaintiff as a surety has no right to the benefit of any securities except those which were pledged for the particular debt for which he has become surety. Being surety for a part of a debt only he cannot claim the benefit of a security given by the debtor to his creditor at a different time for another part of the debt: *Wade* v. *Coope* (2); *South* v. *Bloxam* (3). The equitable right which a mortgagee has of consolidating his securities is one which he can get rid of at any time to the prejudice of those behind him; and a surety cannot stand in a better position than a second mortgagee. When the mortgagee has received his money, then, if no balance remains, the surety for the first mortgage has no equity to proceed against the surplus on a second mortgage, for which he did not become a surety: *Ex parte Rushworth* (4). With respect to the costs recovered against the Plaintiff, and added to his present demand, a surety is not entitled after defending an action to which there was no proper defence, to charge the costs against his principal: *Lampleigh* v. *Braithwait* (5).

(1) Law Rep. 6 Ex. 124.
(2) 2 Sim. 155.
(3) 2 H. & M. 457.
(4) 10 Ves. 409.
(5) 1 Sm. L. C. 6th Ed. 139.

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No creditor of the husband, who has received payment from the wife, even out of her separate estate, can sue the husband without deducting from his claim the amount which he has so received; and as the Plaintiff has received £450 from Mrs. *Tyrie* in repayment of the amount which he has been compelled to pay in the action, the balance of the policy moneys is to that extent set free from any claim on his behalf.

Mr. *Everitt*, for the *Sovereign Life Assurance Company.*

SIR JAMES BACON, V.C.:—

The Plaintiff is entitled to the right claimed by him of having the securities marshalled so as to be paid out of the balance of the policy moneys the sums which he has been compelled to pay under the judgment (including the costs of the action). Upon the other point, the payment to Plaintiff out of her separate estate by Mrs. *Tyrie* stands on the same footing exactly as a payment by an entire stranger under no liability whatever, in order to reimburse Plaintiff for the loss he had been put to on account of her husband, and such payment cannot in any way affect the rights of Plaintiff against the balance of the policy moneys.

Solicitors: Messrs. *Elmslie, Forsyth, & Sedgwick; Dubois; Davies, Campbell, & Reeves.*

In re DAVIES' TRUSTS.

V.-C. W.
1871
Nov. 18;
Dec. 5.

Power of Appointment—Direction to pay Debts—Bequest of Legacies and Residue—Deaths of Residuary Legatees—Lapse—Next of Kin—Wills Act, 1 *Vict. c.* 26, *s.* 27.

S. D., who had, under the will of her late husband, a general power of appointment over a moiety of his residuary estate, by will, in 1869, after directing that her debts should be paid, and giving pecuniary legacies, bequeathed the residue of her personal estate, which she had any title to or interest in, unto her brothers and sisters *M.*, *E.*, *W.*, and *J.* equally, and appointed an executor.

M. and *J.* died in the lifetime of the appointor:—

Held, that the next of kin of the husband were entitled to the shares which *M.* and *J.* would have taken if they had survived the appointor.

12 Ch. D. 208
12 Ch. D. 671
13 Ch. D. 228
36-1
17 Ch. D. 154
155-6-7
22 Ch. D. 239
23 Ch. D. 214

PETITION.

Robert Davies, who died on the 23rd of September, 1866, by will, in June, 1866, after making certain bequests, gave the residue of his estate to trustees, upon trusts *inter alia*, to convert and invest the proceeds, and to pay the income unto his wife, *Sarah Davies*, during her life, and after her death, upon trusts, after the payment of certain legacies, as to one equal moiety of his residuary personal estate, for such person or persons to whom *Sarah Davies* should by will give, appoint, and bequeath the same. The testator appointed *Sarah Davies* and two others executrix and executors of his will, but one of the executors did not prove.

Sarah Davies, who died on the 13th of August, 1869, by will, dated the 5th of that month, after declaring that all her just debts, funeral and testamentary expenses, should be paid and discharged, and giving three legacies, which amounted in the aggregate to £150, proceeded as follows: "I give and bequeath all the rest, residue, and remainder of my moneys in the funds, and all moneys due to me on mortgage or otherwise, and all my personal estate wheresoever and whatsoever of which I shall die possessed, or have any title to or interest in, unto my sister *Mary Minshall*, my sister *Elizabeth Green*, my brother *William Heatley*, and my brother *Joseph Heatley*, to be equally divided between them, share and share alike, as tenants in common; and I appoint *George Minshall* sole executor of my said will."

V.-C. W. 1871

In re DAVIES' TRUSTS.

Both *Mary Minshall* and *Joseph Heatley* died in the lifetime of *Sarah Davies.*

Letters of administration *de bonis non,* with the will annexed of *Robert Davies,* were, in January, 1871, granted to the Petitioner, *Elizabeth Oliver,* and she paid into Court the sum of £347 6*s.* 3*d.* cash to the credit of "In the Matter of the Trusts of the Moiety of the Residuary Estate of *Robert Davies.*"

Robert Davies died without leaving any issue, but he left next of kin; and they contended that the one equal fourth part of the residuary estate of *Robert Davies,* to which *Mary Minshall* and *Joseph Heatley* would have been entitled if they had survived *Sarah Davies,* and which amounted to the sum of £347 6*s.* 3*d.,* formed part of the personal estate of *Robert Davies* undisposed of by his will; and that the £347 6*s.* 3*d.,* together with any further moneys in the hands of the administratrix representing the said equal fourth part of the residuary estate, was distributable amongst the next of kin of *Robert Davies;* and they prayed for a declaration accordingly.

Mr. *T. N. Lawrence,* for the Petitioner:—

The question is whether the appointor intended by her will to exercise her power of appointment over the fund, so as to make it her own for all purposes, and not merely for a limited purpose. There is no gift to trustees; nor a distinct appointment of the whole of the moiety. In no way has the appointor shewn an intention to make the moiety part of her personal estate for all purposes. There has been no blending of the two estates. She had sufficient funds for the payment of her debts and funeral and other expenses. If *Sarah Davies* had died in the lifetime of the testator, he would have died intestate as to this moiety; and therefore he must be treated as having died intestate as to the fund which represents the two shares.

[He cited *Easum* v. *Appleford* (1); *Bristow* v. *Skirrow* (2); *Hawthorn* v. *Shedden* (3); *Shelford* v. *Acland* (4); *Hurlstone* v. *Ashton* (5); *Hoare* v. *Osborne* (6); *In re Caplin's Will* (7); *Wil-*

(1) 5 My. & Cr. 56.
(2) Law Rep. 10 Eq. 1.
(3) 3 Sm. & Giff. 293.
(4) 23 Beav. 10.
(5) 11 Jur. (N.S.) 725.
(6) 12 W. R. 661.
(7) 2 Dr. & Sm. 527–530.

day v. *Barnett* (1); *Chamberlain* v. *Hutchinson* (2); *Wilkinson* v. *Schneider* (3); *Lefevre* v. *Freeland* (4); and *Brickenden* v. *Williams* (5).]

Mr. *Waller*, for the executor of *Sarah Davies*, contended that she had so dealt with the moiety as to bring about an amalgamation of it with her own estate; that the sum in Court representing the two shares was part of her general estate, and that, therefore, it was now divisible amongst her next of kin.

[He referred to *Wilday* v. *Barnett* (6); *In re Wilkinson* (7); *Attorney-General* v. *Brackenbury* (8).]

Mr. *Lawrence*, in reply, referred to *Silk* v. *Prime* (9), and *Tudor's* Leading Cases. (10)

Dec. 5. SIR JOHN WICKENS, V.C.:—

Sarah Davies, having a life interest in the whole, and a general power of appointment over a moiety of the residuary estate of her late husband, *Robert Davies*, made her will, dated the 5th of August, 1869, by which she directed that her debts and funeral expenses should be paid and discharged, and, after giving three pecuniary legacies, proceeded as follows. [His Honour read the words above stated.]

The testatrix survived two of the four persons to whom she bequeathed the residue of her estate, and died on the 13th of August, 1869. As she lived only eight days after making her will, it is to be presumed that the two residuary legatees who died before her died also before the will was made. But this seems for the present purpose immaterial. The question is whether the next of kin of *Robert Davies*, or the next of kin of the testatrix, take the two eighth shares of *Robert Davies'* residuary estate which his widow had power to dispose of, but as to which

(1) Law Rep. 6 Eq. 193–195.
(2) 22 Beav. 444.
(3) Law Rep. 9 Eq. 423.
(4) 24 Beav. 403.
(5) Law Rep. 7 Eq. 310.
(6) Law Rep. 6 Eq. 193.
(7) Ibid. 4 Ch. 587.
(8) 32 L. J. (Ex.) 108.
(9) 1 Bro. C. C. 138, n.
(10) Vol. II. p. 95.

V.-C. W. 1871 *In re* DAVIES' TRUSTS.

her intended disposition failed by lapse, or something analogous to lapse.

It seems settled by the cases of *Chamberlain* v. *Hutchinson* (1) and *Wilkinson* v. *Schneider* (2)—authorities which are binding on me—that a testamentary appointment, under a general power, to *A.* in trust for *B.*, which lapses as to the beneficial interest by *B.'s* death before the appointor, operates as a good appointment in favour of *A.* who holds on the same trusts as if it had been the appointor's own property.

16 L.D. 32

16 L.D. 30

It must also, I think, be considered settled law that where a testator, with a general power of appointment, gives legacies and appoints an executor, he must be taken as exercising his general power to the extent to which the fund subject to it is required to make the legacies effective. And even that where a testator having such a power makes a will directing the payment of his debts without more and appointing an executor, the appointed fund is liable for the payment of his debts if his own estate is insufficient. The same rule would, I conceive, apply in both these cases, though no executor were appointed. It has not yet been decided that an appointment of an executor without more would, since the *Wills Act*, 1 Vict. c. 26, make the fund assets. And so to hold would appear to give a very unnatural construction to sect. 27 of the *Wills Act* as to the execution of powers by a general disposition. Having regard to the 27th section, it seems not unreasonable to hold that a testator having a general power, and directing a certain application of his property, must be taken in all cases to exercise the power to the extent to which the direction is effectual. The difficulty lies in extending this rule to cases where the direction is ineffectual. Of course a testator may say, "I appoint to my executor as part of my personal estate," and may expressly, or in the event, leave his personal estate undisposed of; and yet it may be held that he has nevertheless made it part of his personal estate for all purposes. But in general, where the appointment is for a limited purpose, or a purpose which fails, it would seem, on principle, that there should be no appointment at all, or none beyond the limited purpose. Unquestionably there is great difficulty in construing an appoint-

(1) 22 Beav. 444. (2) Law Rep. 9 Eq. 423.

ment of, for instance, an equitable interest in a money fund to *A.* in trust for *B.* as differing from an appointment of the same fund to *B.*; and doubts might be suggested as to the effect of such a gift where *A.* died before the testator as well as *B.*, or where there is an appointment, for example, to a person in trust for *A.* for her separate use, with remainder to her children, no executor being named, and there being no children. Still, though there is binding authority for holding that a bequest of residue to *A.* in trust for *B.* makes the fund, subject to a general power, assets for all purposes of the appointor, it does not appear to have been yet decided that where there is no appointment to *A.*, but merely an appointment to *B.* direct, and *B.* dies before the testator, the result is the same. Here there is an appointment, which, under the old law as well as the new, would make the appointed fund assets for debts to the extent of any deficiency of the appointor's personal estate; and (at any rate under the new law) would make it assets for paying the legacies in case of a like deficiency. There is then a general gift and appointment of residue which fail as to two fourth parts of it. And the real question is, whether I am bound to hold that these two fourth parts (after payment of all debts and legacies) are effectually appointed for every purpose. No authority seems to go so far; and though to hold otherwise tends to draw a line between gifts not quite satisfactorily distinguished in principle, it seems less dangerous to do this than to adopt the opposite view, and to hold what would, in many cases, carry the effect of a will far beyond its intention. I therefore decide that the next of kin of the husband are entitled. The costs will be as between solicitor and client, and must come out of the fund; and, the administratrix requesting it, I shall direct an inquiry as to the next of kin of *Robert Davies.*

Solicitors for the Petitioner: Messrs. *Bicknell & Hortin.*
Solicitor for the Respondent: Mr. *E. Clarke.*

V.-C. W.
1871
Nov. 17;
Dec. 15.

In re BAKER'S TRUSTS.

Pauper Lunatic in Colony—Maintenance—Wife's Separate Estate—Colonial Statute—Master in Lunacy—Accrued and Future Dividends.

The accrued dividends on a fund settled to the separate use of a married woman, who had been for many years an inmate of a pauper lunatic asylum in the colony of *Victoria, Australia*, were ordered to be paid to the Colonial Master in Lunacy towards the payment of expenses incurred for past maintenance; and the future dividends on the same fund were ordered to be paid to the same Master in Lunacy, he being, on the construction of the Colonial Statute, the committee of the lunatic's estate.

PETITION.

Samuel Baker, the father of *Sarah Salmon*, by will, on the 13th of June, 1852, devised his farms to his sons; and after bequeathing to each of his children the sum of £600, or enough to make up that sum in case he had advanced them money in his lifetime, directed that the income of the residue of his estate should be paid to his wife for her life, and that after her death the residue should be divided amongst his children. The testator settled his daughter *Sarah's* share (including the £600) upon her for life, for her separate use, and so that it should not be alienable, and after her death, gave it to her children, and in case she should have no children he gave it to her brothers and sisters, or such of them as should be living at her death.

The testator died on the 15th of June, 1852. The residue of the testator's estate amounted to more than £9000. It was invested, and the income was paid to the widow during her life. She died in 1864. *Sarah Salmon*, on the 17th of August, 1846, intermarried with *Laurence Salmon*, a builder. They both went to *Australia*. Nothing was heard of *Sarah Salmon* for some years. It appeared in evidence that she was, on the 27th of October, 1858, admitted as a pauper inmate into the lunatic asylum at *Melbourne, Victoria*, and that she had been there ever since. The share of *Sarah Salmon*, under her father's will, amounted to about £1400. The money was paid into Court and invested in consols. The husband was living, but was unable to maintain his wife. He had not

been served with this Petition, which was presented by the Master in Lunacy of the Colony of *Victoria, Australia,* praying that the arrears of the dividends on the consols (about £260) might be applied towards the expenses incurred by that colony in the maintenance of *Sarah Salmon,* and also that the future dividends might be applied towards the lunatic's future maintenance.

Mr. *A. C. Bruce,* for the Petitioner:—

This is the first case in which an application has been made on behalf of a public authority for payment of dividends out of the separate estate of a married woman for the expenses incurred in her maintenance as a lunatic in a pauper establishment. The Master in Lunacy of the Colony of *Victoria, Australia,* is, under the provisions of the Colonial Lunacy Acts of 1867 and 1869, entitled to collect and receive the estate of a lunatic in that colony. In the case of *In re Smeaton's Will,* which came before Sir *J. Stuart* on the 21st of March, 1870, on the petition of *F. Wilkinson,* of *Melbourne,* Master in Lunacy of the Colony of *Victoria,* and of *Hugh Lewis Taylor,* of *London,* manager of the *Bank of Victoria,* and attorney of *F. Wilkinson,* a sum of £119 18*s.* 11*d.*, part of a sum of £989 19. 9*d.* New £3 per Cent. Annuities remaining to the credit of the account in the matter, so far as related to the clear residuary estate, was directed to be sold, and the money to arise by the sale, and the dividends as they should accrue due on the residue of the annuities during the life of *William Charles Smeaton,* were ordered to be paid to *Hugh Lewis Taylor* as the attorney of *F. Wilkinson.* In ordinary cases the expenses of maintaining a wife become, no doubt, a debt of the husband.

[The VICE-CHANCELLOR:—The difficulty in the present case is, that the expenses incurred became a debt of the husband, and the Petitioner asks that it may be paid out of the wife's separate estate.]

Mrs. *Salmon* was not placed in a lunatic asylum by her husband, but by legal authority. Debt can arise only on contract either express or implied; and where a wife is placed either in prison, or, as in Mrs. *Salmon's* case, in a lunatic asylum, there is no contract

V.-C. W. 1871 *In re* BAKER'S TRUSTS.

on the part of the husband, and he is not liable at law for the expenses incurred in her maintenance. That difficulty was recognised in the report for 1850 of the Poor Law Commissioners: *Fry's* Lunacy Acts (1); and after the report had been considered by the authorities, the 5th section of the statute 13 & 14 Vict. c. 101, was passed. By it guardians and overseers are empowered to recover the expenses of maintenance of a pauper lunatic wife from her husband by summary proceeding before the justices.

[The VICE-CHANCELLOR:—Assuming that the section is applicable, does it not increase the difficulty? It says that the husband may be summoned to appear before the justices in reference to the maintenance of his wife, and that they may make an order upon him for the cost of her maintenance. The Petitioner asks me to direct payment to him of the separate estate of Mrs. *Salmon*, in order that he may apply it towards the discharge of what is *primâ facie* her husband's debt.]

Here the husband is quite unable to maintain his wife. There is no direct authority that touches this case. Cases have come before the Courts on applications by boards of guardians in this country, where the persons concerned and the property have been resident and situate; but here the persons concerned are in *Australia*. In none of those cases, however, has there been any attempt to deal with the separate estate of a married woman. In *Peters* v. *Grote* (2) a married woman, entitled to a fund in Court standing to an account in the joint names of her husband and herself, became of unsound mind, and was placed by her husband in a lunatic asylum. The Court allowed a part of the fund to be paid to the husband for the purpose of discharging the debt incurred on her account, and of the sum so received by him he paid part to the proprietor of the asylum, and applied the residue to his own use. The proprietor of the asylum being unable to obtain any further payment from the husband, a petition was presented by the wife's brother stating that she had no property except the fund in Court, and that no settlement was made on the marriage; and in accordance with the prayer of the petition, which had not been served on any one, the Court ordered a further

(1) Pages 545, 546.

(2) 7 Sim. 238.

part of the fund to be sold, and the proceeds paid to the proprietor of the asylum in discharge of the debt due to him; and Mr. *Shelford*, in his book on the Law of Lunatics (1), gives a case of *Re Evans* (24th May, 1826), in which the dividends of a fund held in default of appointment in trust for the separate use of a married woman, without power of anticipation, were ordered to be paid to the husband, to be applied by him as committee in and towards her maintenance; and in March, 1828, it was further ordered that a rent-charge of £200 a year, also settled to the wife's separate use, should be paid to the husband.

[He also cited *Attorney-General* v. *Parnther* (2), *Nettleshipp* v. *Nettleshipp* (3), *Edwards* v. *Abrey* (4), *In re Law* (5), *In re Dodsworth's Trust* (6), and *Davies* v. *Davies* (7); and submitted that the Court had power to make the order asked for as regarded the application of the accrued dividends towards the repayment of expenses for past maintenance; and asked for an order in respect of the future dividends.

Mr. *Renshaw*, for the Respondent, the surviving trustee of the will, did not oppose the application.

The VICE-CHANCELLOR:—On the authority of the case of *Peters* v. *Grote* (8) I will make the order asked for as regards the application of the accrued dividends to the cost of past maintenance; but before I make any order appropriating the future dividends for the cost of the future maintenance of the lunatic, I should wish the Colonial Acts to be further looked into; and the Petition must stand over for that purpose.

Mr. *Renshaw*:—I have looked through the Colonial Act, intituled the *Lunacy Statute* (No. 309), which was passed by the Legislature of the Colony of *Victoria* on the 6th of September, 1867, "to consolidate and amend the law relating to lunatics;" and also the Act (No. cccxlii.) which was passed on the 31st of August, 1869, to amend "The *Lunacy Statute*," and it appears that by sect. 3 it

(1) 2nd Ed. p. 204.
(2) 3 Bro. C. C. 440, 444.
(3) 10 Sim. 236.
(4) 2 Coop. C. P. 177.
(5) 7 Jur. (N. S.) 410.
(6) 10 Hare, 16.
(7) 2 D. M. & G. 51.
(8) 7 Sim. 238.

V.-C. W. 1871 *In re* Baker's Trusts.

was enacted that the 147th section of the *Lunacy Statute*, which limited the power of the Master in Lunacy, should be repealed; and in lieu thereof it was enacted "That the Master may and shall, out of the estate of any lunatic patient, pay such sum or sums for the maintenance of such patient, and for the maintenance of his wife or other near relative, and for the maintenance and education of his children, as to the Master shall seem expedient and reasonable." It appears to me, and I submit, that the Master in Lunacy of the Colony is in the position of a committee, and that as committee he stands in the place of the lunatic wife, and is entitled to be paid the future dividends.

Sir John Wickens, V.C.:—

I think, looking at the language of the Colonial Lunacy Acts, that the Master in Lunacy of the Colony is entrusted with the powers of a committee of a lunatic's estate, and therefore I will order the future dividends to be paid to him as the person who will be accountable for their application; but I will not direct the application of them to be in any particular way. The order will be in these terms: Let the costs of the trustee of this application, including any costs properly incurred in communicating with the Petitioner, be paid out of the accrued dividends; let the residue be paid to the Petitioner; and let the future dividends on the fund in Court be paid to the Petitioner during the life of *Sarah Salmon*, or until further order.

Solicitors: Messrs. *Roy & Cartwright*; Messrs. *Satchell & Chapple*, agents for Mr. *Wittey, Colchester*.

FRANCE *v.* FRANCE.

V.-C. W.

1871

[1871 F. 98.]

Nov. 24; *Dec.* 12, 19.

*Bill for Partition—Sale—*31 & 32 *Vict. c.* 40, *ss.* 3, 4—*Infant Plaintiffs' "Request" for a Sale.*

Three infant Plaintiffs, who were with the infant Defendant tenants in common of lands under a will, filed a bill for partition, and on motion for decree, on the cause coming on to be heard as a short cause, the Plaintiffs made, under the provisions of the statute 31 & 32 Vict. c. 40, ss. 3, 4, a "request" for a sale of the lands.

On the authority of the order made in the cause of *Young* v. *Young* (1), the costs of all parties were declared to be a charge upon their shares in the lands; and a sale was ordered.

UNDER the will of *Robert Harris*, dated the 23rd of February, 1867, the Plaintiffs and the Defendant, all infants, became entitled as tenants in common in possession to certain freehold and copyhold lands near *Colchester*. On the 20th of October, 1871, a bill was filed by three of the infants by their mother, as their next friend, against the Defendant for a partition. The cause came on to be heard as a short cause on motion for a decree. Minutes had been prepared.

Mr. *Graham Hastings*, for the Plaintiffs, asked for an order according to the minutes in which the Plaintiffs made a "request," under the provisions of the statute 31 & 32 Vict. c. 40, ss. 3, 4, that the lands might be directed to be sold. The Plaintiffs also asked that they might, under the provisions of the *Trustee Act*, 1850 (13 & 14 Vict. c. 60), be declared trustees of the lands within the meaning of the Act.

The VICE-CHANCELLOR:—The order for sale is to be made on the "request of any of the parties interested;" but the difficulty here is, that there is no party to make the request.

Mr. *Hastings*:—Sect. 3 of the statute empowers the Court to direct a sale "in a suit for partition where, if this Act had not been passed, a decree for partition might have been made;" under certain circumstances "a sale of the property and a distribution

(1) *Inf*: p. 175, n.

See Davey v. Hitchcock 32 L 15 Eq 269 V.C.W. and Grace v. Cowper 32 L 18 Eq 387 V.C.M. where ord. was made on statement that sale would be more beneficial than a division — on request of infant Pl. see mins. of 1888

V.-C. W. 1871 FRANCE v. FRANCE.

of the proceeds would be more beneficial for the parties interested than a division of the property between or among them . . . . on the request of any of the parties interested, and notwithstanding the dissent or disability of any others of them;" and sect. 4 empowers the Court, in a suit for partition, to direct a sale of the property on the application of a certain proportion of the parties interested. It is quite clear that an infant can file a bill for partition.

The VICE-CHANCELLOR:—That is not now the question. What I am asked to do is to order the conversion of real estate into money under the statute, and I can do that only on the request of any of the parties interested; but a request by an infant is a nullity. Is there any case where such an order has been made on the request of an infant Plaintiff?

Mr. *Hastings*:—I have not been able to find any such case; but I submit that the filing of a bill is a request within the meaning of the Act.

The VICE-CHANCELLOR:—I must decline to make the order.

Dec. 12. Mr. *Hastings*:—Since the case of *France* v. *France* was before the Court on the 24th of November, I have been favoured with the papers in a case of *Young* v. *Young* (1), which was before Vice-Chancellor *Malins* in March, 1870. The bill was filed on the 26th of February, 1870 [1870 Y. 7], by an infant Plaintiff by her next friend against two infant Defendants praying that a partition between them might be made of the advowson, donation, and perpetual right of presentation in and to the vicarage of the parish church of *Newchurch*, in the *Isle of Wight*, with the rights, members, and appurtenances; and for further relief. The cause came on to be heard as a short cause on the 19th of March, 1870. Mr. *Archibald Smith*, for the Plaintiff, on moving for a decree, asked for a sale under the provisions of the statute 31 & 32 Vict. c. 40; and the common decree for a sale instead of for a partition was made.

The Registrar objected to draw up the order, on the ground

(1) *Inf*: p. 175, n.

that the Court had no power under the statute—the parties being infants—to make an order for a sale. The matter was again brought before the Court on the 29th of March, 1870, and the Vice-Chancellor *Malins*, after remarking that he considered that the circumstance of all the parties being under disability was not an objection, said, that notwithstanding he felt a difficulty in making the order on the request of an infant, as it might cause a difficulty in regard to the title, he would make the order for sale, and direct that it should be drawn up as well under the old practice in reference to the sale of property for the purpose of paying costs, as under the Act of 1868 (1).

It appears that the Conveyancing Counsel of the Court, before whom the matter went, settled the conditions of sale, and considered that a good title could be made; and it does not appear that any objection has been taken to it. I submit that the Court has power to make the order for sale, and that, under all the circumstances, it will be a proper order to make in this case.

Mr. *H. J. Hunter* appeared for the Defendant.

Dec. 19. SIR JOHN WICKENS, V.C., now (addressing Mr. *Hastings*) said:—

I think you are entitled to the order which you asked for on the

(1) YOUNG *v.* YOUNG.

The order in this case was as follows:—

This Court doth declare that the advowson, donation, and perpetual right of presentation in and to the vicarage of the parish church of *Newchurch*, in the *Isle of Wight*, and county of *Southampton*, is divisible among the Plaintiff and Defendants (as the co-heiresses at law of *William Young*, deceased, the intestate in the bill named) in equal third parts; and doth order that it be referred to the Taxing Master to tax the Plaintiff and Defendants their costs of this suit; and doth declare that the costs of the infant Plaintiffs and Defendants be a charge on their respective shares in the said advowson; and it appearing that, for the purpose of raising the said costs, and by reason of the nature of the property, a sale of the said advowson and a distribution of the proceeds thereof, after payment of such costs, will be more beneficial for the parties interested than a partition of the property between them, this Court doth order that the said advowson be sold with the approbation of the Judge, and that the money to arise by such sale be paid into the bank, with the privity of the Accountant-General, to the credit of this cause." Liberty was given to any of the parties to apply.

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24th of November. I have read the papers in the precisely similar case of *Young* v. *Young*, in which Vice-Chancellor *Malins* made an order for sale, and though I know of no other authority for the practice, I will follow that precedent. Let the order be in the form of that in the case of *Young* v. *Young*.

Solicitor: Mr. *H. H. Poole.*

V.-C. W. 1871 Dec. 21.

LETTS *v.* HUTCHINS.

[1871 L. 155.]

Mortgage of Reversionary Interest — Bill by Mortgagee for Administration of Testator's Estate—Payment by Surety of Principal and Interest due, and Costs—Six Months' Interest disallowed—Costs.

23 L.J.Ch. 374

W. S. in 1855, mortgaged a reversionary interest to which he was entitled under his father's will, and died in March, 1869, intestate, and there was no legal personal representative. The Plaintiff, the mortgagee, having filed a bill for the administration of the father's estate, was, on behalf of a surety of the mortgagor, paid the principal and interest due on the mortgage security and a sum for costs of suit. On motion to dismiss the bill:—

Held, that the Plaintiff was not entitled to six months' interest in lieu of notice, but that he was entitled to the costs of the motion, as he had been paid off in a summary way.

ROBERT SLATER, by will, gave his estates to three trustees, of whom the Defendant, now in his seventy-second year, was the survivor, upon trusts, subject to an annuity to his wife, for the benefit of his children—three sons.

By an indenture, in September, 1855, *William Slater*, one of the sons, assigned his reversionary share in the property to the Plaintiff, his heirs, executors, administrators, and assigns, to secure the payment of £1500 and interest; and his brother *Robert* was joined as surety in the mortgage for payment of the money.

William Slater died in March, 1869, intestate, and no legal personal representative had been appointed.

The bill was filed on the 7th of November, 1871, alleging that the £1500 was still due, with interest from the 29th of September, 1871. The Plaintiff prayed that the trusts of the will of testator,

so far as they remained unexecuted, might be executed under the direction of the Court; for accounts and inquiries, and for costs.

It was stated that the widow of the testator died on the 25th of November, 1871.

On the 15th of December, 1871, the principal and interest (£1520 19*s.* 6*d.*) due on the mortgage security, and a sum of £25 for costs, were tendered to the Plaintiff on behalf of *Robert Slater*, the surety; but he declined to receive the moneys in satisfaction of the principal and interest, and required six months' interest in lieu of notice. He, however, allowed the moneys to remain in his hands, but he would not consent to stay the proceedings in the suit.

Mr. *Crossley* moved, on behalf of the Defendant, that the Bill might stand dismissed, and that the costs of the application might be paid by the Plaintiff. He submitted that the bill was, in fact, one for the realization of the security; that it must be considered that the Plaintiff wished to be paid his money at once; and that therefore, on being paid off, he was not entitled to six months' interest: *Paynter* v. *Carew* (1).

Mr. *F. T. White*, for the Plaintiff:—

According to the ordinary rule, the Plaintiff is entitled to six months' interest. This is not a foreclosure suit, but even if it were, the Plaintiff would be entitled to reasonable notice before being paid off. When the bill was filed the annuitant was living and the mortgagor was dead; there was no legal personal representative, and the surviving trustee was in the seventy-second year of his age. The paying off without notice gives no time to reinvest the moneys upon a good security; and supposing moneys were in trust, a great hardship, if interest should not be allowed, might be inflicted on the *cestuis que trust*. It is but fair that the party who has lent his money upon the security should have a reasonable opportunity of finding some other security.

[He cited *Browne* v. *Lockhart* (2); *Day* v. *Day* (3).]

SIR JOHN WICKENS, V.C.:—

In my opinion the Plaintiff has no claim whatever to six months' interest. The order will be: dismiss the bill, and let the Plaintiff's

(1) Kay, App. xxxvi., xliii. (2) 10 Sim. 420–424. (3) 31 Beav. 270.

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costs of the suit be taxed; and if the sum of £25 already paid by the Defendant be insufficient, let the Defendant pay any further sum that may be necessary to satisfy them. As the Plaintiff has been paid his money in a summary way, I will allow him the costs of this motion. Any deeds that are in the Plaintiff's possession belonging to the mortgagor must be handed over to the proper party on the payment of the taxed costs.

Solicitors: Mr. *Letts*, Jun.; Messrs. *Bailey & Child.*

V.-C. W. 1871 Dec. 21.

In re BANK OF HINDUSTAN, CHINA, AND JAPAN.

FRICKER'S CASE.

Winding-up—Companies Act, 1862, *s.* 115—*Summons to examine a Witness.*

A mother-in-law of a contributory having declined to give liquidators any information as to his address, a summons was, under the 115th section of the *Companies Act*, 1862, ordered to be issued for her examination.

THE *Bank of Hindustan, China, and Japan, Limited*, was, by resolutions passed at extraordinary meetings of the shareholders, ordered to be wound up voluntarily. By an order of Vice-Chancellor *Stuart*, dated the 21st of December, 1866, the voluntary winding-up was ordered to be continued subject to the supervision of the Court. Four liquidators were appointed. The list of contributories settled by them included the names of *Harriett Fricker*, of *Northumberland Terrace, Regent's Park*, spinster, for twenty-seven shares; *Eliza Fricker* and *Francis Fricker*, of the same place, for twenty-seven shares and twenty-six shares respectively, and *John Fricker*, of 25, *Medina Road, Seven Sisters' Road*, for forty-five shares.

Since the bank went into liquidation nothing had been paid by these contributories in respect of their shares, and for calls and interest there was a sum of about £1500 owing. Balance orders had been obtained, but the efforts made to serve them upon, and to obtain reliable information as to the position and means of the contributories had failed. In the course of the inquiries recently made it was ascertained that *John Fricker* a short time since

married a daughter of a Mrs. *Ewer*, of *Victoria Villa, Victoria Road, Kentish Town*, but on being questioned she, admitting he was her son-in-law, refused to furnish his address, and gave evasive replies to other questions put to her in reference to the positions and addresses of the three other contributories.

An application was, on behalf of the liquidators, made to the Chief Clerk for a summons, under the 115th section of the *Companies Act*, 1862, for Mrs. *Ewer's* examination, but it was refused. The application was adjourned to the Judge in Chambers, and he also refused it.

At the request of the liquidators the matter was adjourned into Court.

Mr. *Higgins* now moved *ex parte* that the summons should be issued, and submitted that there was authority for the application in the cases of *In re Mercantile Credit Association, Clement's Case* (1); affirmed by the Lord Chancellor *Cairns* (2) in *In re Financial*

(1) 1868. Feb. 27. SIR W. P. WOOD, V. C.:—

In re MERCANTILE CREDIT ASSOCIATION.

CLEMENT'S CASE.

THE name of *T. G. Dyke* was on the register of shareholders in the *Mercantile Credit Association* for 823 shares. The company was ordered to be wound up. The liquidator, having made calls on the shares amounting to a sum of over £8000, and no part of the calls having been paid, caused inquiries to be made as to the ability of *T. G. Dyke* to pay the sum owing. It was discovered that at the time when the shares were transferred he was an infant residing with his father, and receiving wages as a clerk to a law stationer; and that he had no property. The transfer was made to *T. G. Dyke* with his consent, Mr. *Clement*, a broker, acting on his behalf in the matter, and it being through his agency that the name was placed on the register. *T. G. Dyke* had attained his majority, but he had not repudiated the transfer. The liquidator having applied to Mr. *Clement* for information in reference to the transfer, in the hope of being able to make the transferor liable for the calls, and he having refused to give any information, a motion was made under the *Companies Act*, 1862, s. 115, for a summons against Mr. *Clement*, for his examination in reference to the transfer.

The VICE-CHANCELLOR, after stating that the circumstances attending the transfer were peculiar, ordered that Mr. *Clement* should be summoned to attend the Judge in Chambers at such times as the Judge might appoint, to be examined as the Judge should direct touching the estate and effects of the association.

(2) Mr. *Clement* appealed against the order, and the case came on to be heard before Lord *Cairns*, L. C., on the 15th day of April, 1868, when his Lordship, in delivering judgment, said:—

This is an appeal from an order made by the Vice-Chancellor, which order has proceeded upon the assump-

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FRICKER'S CASE.

Insurance Company, Bloxam's Case (1); *Swan's Case* (2); and in *In re London Gas Meter Company* (before the Master of the Rolls, Dec. 20, 1871); in which a contributory in arrear for calls was sum-

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tion that Mr. *Clement* is, in the words of the 115th section of the Act of Parliament, "a person whom the Court may deem capable of giving information concerning the trade, dealings, estate, or effects of the company," which is being wound up. Without saying that in no case could an appeal be entertained upon a question of that kind, I think I may safely state that it would require a very strong case indeed to be made of error on the part of the Vice-Chancellor—that he has arrived at a conclusion which would justify the Court of Appeal on a mere matter of administration of this kind in taking a different view from that which the primary Judge has taken. Mr. *Wickens* says, what is very true, that according to the general law of the land, irrespective of statute law, there is a protection thrown around persons who are called upon a *subpœna ad testificandum* of this kind; and that even supposing the parties to the litigation who are to be examined as witnesses do not themselves take any objection of irrelevancy, a witness may apply to the Judge before whom he is examined and ask whether he is bound to answer the particular question which appears to him to have no connection with the issue raised between the parties, and as to the question so put, if the Judge says that in his judgment the witness ought to answer, he must do so. That is a protection, no doubt, which a witness has according to the general law of the land. But it appears to me that the Legislature, whether wisely or unwisely is immaterial, but we must take it in this proceeding to be wisely, has, under the 115th section, put the persons who are ordered to attend upon a different footing. They are not persons, necessarily, called to be examined upon an issue raised between the parties. If that were the purpose for which they are called, this section would not have been required at all. But this is a section which adds a very large additional power to what was the ordinary law of the land in regard to the calling of witnesses under a *subpœna ad testificandum*. All that is to be looked at here is, has the Judge rightly deemed the person who is ordered to attend "capable of giving information concerning the trade, dealings, estate, or effects of the company"? and that person being called and examined before the Court, when a question is put to him "concerning the trade, dealings, estate, or effects of the company," I apprehend he would have a right to ask the Judge before whom he is examined—to this extent, and to this extent only—whether the question put to him is a question "concerning the trade, dealings, estate, or effects of the company?"

Now, what is Mr. *Clement's* position? He is a broker. It is not disputed that he acted in that capacity in buying and selling and transfering the shares which now stand on the register of the company in the name of *T. G. Dyke*. Beyond all doubt the shares and the liability upon the shares form part in this case—and in all these cases a very material part—of the estate and effects of the company which is being wound

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(1) 36 L. J. (Ch.) 687. (2) Law Rep. 10 Eq. 675.

moned under the 115th section of the *Companies Act*, 1862, for examination. In that case the witness refused [to answer certain questions put to him touching his estate, and especially in reference

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up. I could go further, and say the manner and form in which, and the circumstances under which shares of this kind have been entered on the register may well be taken to be part of the dealings of the company; because it is one of the functions of a company to enter shares upon the register; a function which in this case has been performed by the company. We cannot speculate as to what Mr. *Clement* may say. It may turn out when he is called that he will say: "I really cannot tell you anything about the trade, dealings, estate, or effects of the company." But looking at the matter in its present aspect, it appears to me abundantly clear that the Court may well deem him to be a person capable of giving information concerning this matter. What will be done with the information afterwards, whether it will persuade the liquidator and the Court that no further step ought to be taken concerning *T. G. Dyke*, or any one else, I do not know. That is a matter which I have nothing to do with. It may, on the other hand, persuade the liquidator and the Court that some steps ought to be taken in reference to the shares which stand in the name of *T. G. Dyke*. It does not appear to me that under the 115th section the liquidator is bound, before the Court makes the order for the attendance of the person to answer questions, to launch a particular case, and to raise a particular issue with some one particular person. On the contrary, I think the whole scope of the section is, that the power under it may be exercised before the liquidator has launched any case against any particular person; and it is not said that this is to be an examination, necessarily, in the face of contending parties.

To go further than this, and to refer to the question of infancy. It may well be a matter desirable to inquire into what Mr. *Clement* knows as to the position of *T. G. Dyke* when he took the shares. Whether he was an infant or not? What passed between them? Under what circumstances, if an infant, it came to pass that the shares were taken by him? Whether, at majority, or after majority? Whether he knows anything more of *T. G. Dyke* than he knew at the time when he actually made the transfer of the shares? These are all matters as to which Mr. *Clement* may have something to say. On the other hand, if it should turn out that he has nothing to say as to them, he will have received a reasonable sum for his expenses under the section; and he will be protected against being asked questions relating to those things which do not concern the trade, dealings, estate, or effects of the company. Mr. *Clement* may have felt it his duty for the protection of his order to appeal, but I must say I think he was unnecessarily alarmed, and I cannot do otherwise than dismiss the appeal with costs.

Mr. *Druce*:—Merely to save a misapprehension, I wish to ask your Lordship to observe that in the 117th section it is said when a person is before the Court he can be examined touching the "affairs" of the company.

Mr. *Kay*:—The order will be as it stands.

Mr. *Druce*:—Your Lordship used the exact words in the 115th section. It may be worth while to look at the

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FRICKER'S CASE.

to a creditors' deed which he had executed; but he was ordered to answer them. He thought it proper to state that in the case of *In re Accidental and Marine Insurance Corporation, Mercati's Case* (1), it was held that a mere creditor of a company in liquidation, who is not shewn to be capable of giving the information referred to in the 115th section, is not a person to be examined under that section.

[He also referred to *In re English Joint Stock Bank, Bradlaugh's Case* (2), and *In re Smith, Knight, & Co.* (3).]

SIR JOHN WICKENS, V.C.:—

Swan's Case (4) seems a distinct authority in favour of the order asked. The practice in these cases has been assimilated to the practice in bankruptcy, and in bankruptcy a very wide net is thrown to obtain evidence. I, however, decide this case entirely upon the authority of *Swan's Case.*

Solicitors: Messrs. *Ashurst, Morris, & Co.*

117th section, in which the word "affairs" is used.

THE LORD CHANCELLOR:—The words are: "The Court may examine upon oath, either by word of mouth or upon written interrogatories, any person appearing or brought before them in manner aforesaid concerning the affairs, dealings, estate, or effects of the company . . ." The only difference seems to be that the word "affairs" is substituted for that of "trade." I do not mean to prejudice the case as to what may be the questions put to this gentleman when he is called beyond this, that he will have the protection of being guarded against being asked any question not authorized by the Act. Whether the 117th section goes beyond the 115th, I do not at present offer any opinion.

(1) Law Rep. 5 Eq. 22.
(2) Ibid. 3 Eq. 203.
(3) Ibid. 4 Ch. 421.
(4) Ibid. 10 Eq. 675.

In re WOODCOCK'S SETTLED ESTATES.

V.-C. W.
1871
Nov. 9.

Investment—Practice in Accountant-General's Office—Request—Settled Estates Acts, 19 & 20 *Vict. c.* 120; 21 & 22 *Vict. c.* 77; 27 & 28 *Vict. c.* 45, *s.* 25.

An undivided moiety in land was ordered under the *Settled Estates Act* to be sold, and the proceeds to be paid into Court and invested in Consols. The sale was made, and the money paid into Court, but there being no request to invest left at the office the money, according to the practice in the office, remained uninvested. A motion for leave to bring an action against the Accountant-General, or to examine the precedents in the office, refused with costs.

BY an order, dated the 22nd of December, 1865, made on the petition of *J. Dixon*, certain settled estates at *Sheffield*, for which £2400 had been offered, were ordered to be sold under the *Settled Estates Acts*, and one moiety, £1200, of the purchase-money, when the sale had been completed, was ordered to be paid into the bank, with the privity of the Accountant-General, to the credit of *Woodcock's* Settled Estates; "and that until the same when paid in can be laid out in the purchase of other hereditaments to be settled in the same way, the same be laid out in the purchase of Bank £3 per Cent. Annuities in the name of the Accountant-General, on the like credit, and the interest as it accrued due be paid to the Petitioner."

On the 20th of June, 1866, the moiety of the £2400 was paid into Court, but no request was made to invest it until June, 1870, neither was any application before that date made for dividends.

On the 24th of June, 1870, inquiry was made by the Petitioner's solicitor for the fund, when it was ascertained that it had remained uninvested, and the applicant was informed that the well-established practice of the office was that with the order directing the investment the solicitor, if he desired an investment, should leave a written request to invest. He was also informed that the fee for the attendance of the solicitor to request investment, and on the drawing up of the request, was distinctly provided for at pages 201 and 205, 2nd Schedule of the Consolidated Orders.

In August, 1870, the money was invested in Consols in pursuance of the request.

V.-C. W. 1871 *In re* WOODCOCK'S SETTLED ESTATES.

A motion was now made for leave to bring an action against the Accountant-General for not investing, or for leave to inspect all books, papers, and documents shewing the dealings with the said £1200, and all requests for the investment of money paid into this or any other credit since the time aforesaid.

Mr. *J. H. Palmer*, Q.C., and Mr. *Langley*, for the motion:—

As to the form of the motion, it is clear that before an action can be brought against an officer of the Court the leave of the Court must be first obtained: *Whitehead* v. *Lynes* (1); *Aston* v. *Heron* (2). On the main point it is submitted that it was the duty of the Accountant-General to invest the money as soon as it was paid in. The particular order directed it; and by the 19 & 20 Vict. c. 120, s. 25, it ought to be invested when paid in. The defence to this application is, that by the practice of the office no investment is made without a special request to do so; but assuming the practice to be as described, it is a practice founded on no Rule, Order, or Act of Parliament, and therefore cannot be urged as a valid defence for disobedience to the peremptory order of this Court, and to the provisions of the Act. No special request is required by the Accountant-General for investments under the *Legacy Duty Act* and the *Trustee Relief Act*. Then why should not the same rule be adopted here?

Mr. *Dickinson*, Q.C., and Mr. *Method*, for the Accountant-General, were not called on.

SIR JOHN WICKENS, V.C.:—

An order of the Court like that in question does not compel or authorize an immediate investment to be made by the Accountant-General. The practice of the office in this respect has been long settled, and appears to be recognised by the 11th and 12th rules of the 1st of the Consolidated Orders. It is also convenient; and cases might be easily suggested in which any other practice would lead to needless expense. The 25th section of the Act, which has been relied on as peremptorily directing an investment, must be taken to mean an investment according to the course of the Court, and that

(1) 34 Beav. 161. (2) 2 My. & K. 390.

view is supported by the *Legacy Duty Act* and the *Trustee Relief Act*, and the orders made in connection with those two Acts. The motion is a mere experiment, and must be refused with costs.

Solicitor for the Motion: Mr. *H. A. Maude.*

Solicitor for the Accountant-General: *The Solicitor for the Suitors' Fee Fund.*

C. J. B.

1871

Dec. 4.

In re WILSON.

Bankruptcy Act, 1869, *s.* 23—*Rule* 28 *of the Rules of July* 7, 1871—*Onerous Property—Disclaimer of Leasehold Interest by Trustee—Leave of Court—Special Form of Order.*

In cases where the property acquired by the trustee under the *Bankruptcy Act*, 1869, consists of leasehold interests, the Court will exercise its discretion in allowing the trustee to disclaim such interest.

THIS was a motion by Mr. *Mitcheson*, the trustee under the liquidation of the estate of Mr. *Frederick Andrew Brown Wilson*, for leave to disclaim a lease which had been assigned to the debtor.

From the affidavit of *Pound*, the principal creditor of *Wilson*, it appeared that part of the debtor's estate consisted of the lease of the house No. 288, *Edgeware Road*, subject to a mortgage to *Pound*, the rent being £200 a year. The lease was dated the 18th of November, 1868, and made between *Joseph Simmons*, of the one part, and *John Bashford*, of the other part, and was a lease from the 29th of September, 1868, for a term of twenty years, and the half of another year, less ten days, subject to a power to the lessee of determining the lease at the end of the first seven years. By a deed of assignment dated the 28th of December, 1869, *Bashford* assigned the lease to *Pound*, who, by an assignment dated the 7th of April, 1870, assigned it to *Wilson* for the residue of the term; and *Wilson* on the following day demised the premises, by way of under lease, to *Pound* for the residue of the term, except the last day, as a security for money owing by him to *Pound*. It appeared from the affidavit of *Pound* that neither the lease nor the mortgage to him were of any value, and that the lease contained onerous and burdensome covenants. *Pound* was willing that the trustee should disclaim the lease; and notice of this motion was served on *Simmons*, *Bashford*, and *Pound*, the first of whom appeared.

Mr. *Bagley*, in support of the motion:—

The 23rd section of the *Bankruptcy Act*, 1869 (1), entitles the

(1) Section 23, so far as is material, is as follows: "When any property of the bankrupt acquired by the trustee under this Act consists of land of any tenure burdened with onerous covenants . . . . the trustee, notwithstanding he has

trustee to disclaim; and Rule 28 of the Bankruptcy Rules, July 7, 1871 (1), does not take away that right, but requires the leave of the Court to be obtained previous to the execution of the disclaimer. The object of the Act was clearly stated by the Lords Justices in *Ex parte Llynvi Coal and Iron Company* (2): "The broad purview of this Act is that the bankrupt is to be a freed man, freed not only from the debts, but from contracts, liabilities, engagements, and contingencies of every kind."

Mr. *Montagu* (solicitor) appeared for *Simmons*.

SIR JAMES BACON, C.J.:—

I cannot allow the trustee to disclaim the lease; but as the only interest that the bankrupt possesses under the lease is an equity of redemption, that interest I will allow the trustee to disclaim, the landlord giving an undertaking not to prove or make any claim against the debtor's estate. The order should be carefully drawn up, as this is the first time the question has been brought before the Court.

MINUTES:—Upon the landlord undertaking not to make any claim or to prove against the estate of the said *Frederick Andrew Brown Wilson*, in respect of the said lease or any of the covenants in it, it is ordered that the trustee may be at liberty to execute a disclaimer of the equity of redemption in the said mortgage of the said lease of the 8th day of April, 1870.

Solicitor: Mr. *F. W. Hilbery*.

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endeavoured to sell or has taken possession of such property, or exercised any act of ownership in relation thereto, may, by writing under his hand, disclaim such property, and upon the execution of such disclaimer the property disclaimed shall,..... if the same is a lease, be deemed to have been surrendered on the date of the order of adjudication."

(1) Rule 28 of the Rules of the 7th of July, 1871, is as follows: "Where any property of a bankrupt acquired by a trustee under the *Bankruptcy Act*, 1869, shall consist of a leasehold interest, the trustee shall not execute a disclaimer of the same without the leave of the Court being first obtained for that purpose; and upon any application to the Court for such leave, notice of the desire of the trustee to disclaim such interest shall be given to such person or persons as the Court shall direct, and such order shall be made thereon as the Court shall think fit."

(2) Law Rep. 7 Ch. 28, 32.

C. J. B.
1871
Dec. 11.

Ex parte CALDWELL.

In re CURRIE.

Bankruptcy—Order and Disposition—Notice—Policy of Insurance.

Previous to his marriage *C.* insured his life in two offices for two sums of £500 each, and by his marriage settlement covenanted to insure his life for not less than £2000. On the 29th of October *C.* handed over one of the policies to the solicitor for the trustees of the settlement, and on the 9th of December signed a memorandum stating that he handed over the two policies to the trustee in pursuance of the covenant contained in the settlement. *C.* was adjudicated bankrupt on the 13th of December. The other policy was handed over to the solicitor for the trustees on the 10th of January in the following year. Notice of the claim of the trustees to the policies was given to the offices after the bankruptcy, but before any notice had been given by the assignee:—

Held, that the policies were in the order and disposition of the bankrupt at the commencement of the bankruptcy, and belonged to his assignee.

THIS was an application by Mr. *Caldwell*, the assignee of the estate of Mr. *Mark Riddell Currie*, for an order declaring that two several policies of assurance on the life of Mr. *Currie*—the one effected in the *Royal Insurance Company* for 5000 Rs., the other in the *Standard Life Office* for 5000 Rs.—belonged to and formed part of the estate of Mr. *Currie*, and that the same might be respectively delivered up to Mr. *Caldwell* for the benefit of the creditors of Mr. *Currie*.

By a deed of settlement dated the 30th of March, 1869, and made in contemplation of his marriage, which afterwards took place, the bankrupt covenanted with Mr. *Algernon Currie* and *E. J. Stanley*, the trustees of the settlement, that in case the said intended marriage should take effect, he would, within three months after the solemnization thereof, effect a policy on his life in the names of the said *Algernon Currie* and *E. J. Stanley*, or other the trustees for the time being, for a sum or sums not less in the whole than £2000; and he also covenanted to pay the premiums. No insurance was effected after the marriage; but on the 29th of October, 1869, the policy effected in the *Royal Insurance Company* was handed over by the bankrupt to Mr.

Upfill, the solicitor for the trustees of the settlement. On the 9th of December, 1869, four days before his bankruptcy, the bankrupt, on the suggestion of Mr. *Upfill*, signed the following memorandum:—

"I, the undersigned *Mark Riddell Currie*, of *Hazeldean Crawley*, in the county of *Sussex*, merchant, hereby, in pursuance of a deed of settlement dated the 30th day of March last, wherein I covenanted to insure my life in the sum of £2000 in the names of *Algernon Currie* and *Edward Jamieson Stanley*, the trustees in the said settlement named for the purposes therein named, deliver up and hand over to the said trustees all that policy of assurance in the *Royal Insurance Company*, and numbered 17,367, being a policy for rupees five thousand on my life; also all that other policy of assurance in the *Standard Life Assurance Company*, and numbered 235W, being a policy for rupees 5000 on my life, which said last-mentioned policy is now in the possession of my wife's trustee, *Edmund Jamieson Stanley*. Dated this 9th day of December, 1869."

On the 13th of December, 1869, the bankrupt presented his petition to the Bankruptcy Court, and was adjudged bankrupt; and Mr. *Caldwell* was, on the 25th of December, appointed assignee.

In January, 1870, the bankrupt handed over to Mr. *Upfill* the *Standard* policy.

On the 19th of December, 1870, the bankrupt passed his last examination and obtained his discharge, and on the 22nd of December he died.

Notice that the policies were claimed by the trustees of the settlement was given to the insurance offices after Mr. *Currie* had been adjudicated bankrupt, but before any notice to the offices had been given by the assignee.

Mr. *De Gex*, Q.C., in support of the application:—

At the time of the bankruptcy these policies were in the order and disposition of the bankrupt, with the consent of the trustees of the settlement; these two policies were, in fact, not affected by the settlement.

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Ex parte CALDWELL *In re* CURRIE.

Mr. *Roxburgh*, Q.C., and Mr. *Robertson Griffiths*, for the trustees of the settlement:—

The question is, has sufficient been done to take these policies out of the order and disposition clause; both policies were handed over by the bankrupt—one before, and one after, his bankruptcy. The assignee gave no notice at all to the offices; we gave notice to both, although after bankruptcy had occurred, and bankruptcy is not of itself notice: *In re Barr's Trusts* (1).

[They also referred to *In re Young* (2); *Ex parte Pooley* (3); *Ex parte Heathcote* (4).]

Mr. *De Gex*, in reply on *In re Barr's Trusts*:—

Barr's Trusts simply decides that an assignee must give notice in order to entitle himself against subsequent incumbrancers; and in this case the assignee never heard of the policies, and notice by assignees claiming under the order and disposition clause is never necessary as against antecedent incumbrancers, or at all: *In re Rawbone's Trusts* (5).

SIR JAMES BACON, C.J.:—

I am clearly of opinion that the assignee is entitled to the money due on both these policies, as they must be held to have been at the time of the bankruptcy in the order and disposition of the bankrupt, with the consent of the true owners. The costs of all parties will come out of the estate.

Solicitors: Messrs. *Hillyer & Fenwick*; Mr. *Upfill*.

(1) 4 K. & J. 219. (3) 2 M. D. & D. 505.
(2) 1 M. D. & D. 111. (4) Ibid. 711.
(5) 3 K. & J. 476.

NESHAM *v.* SELBY.

M. R.
1872
Jan. 12.

[1870 N. 60.]

Agreement for Lease—Memorandum in Writing—Correspondence—Statute of Frauds.

A bill for specific performance alleged a verbal agreement for the lease of a house by the Plaintiff to the Defendant for seven years from Michaelmas, 1870, followed, first, by a letter from the Defendant to the Plaintiff, which did not state when the term was to commence, and, secondly, by another letter of the Defendant to the Plaintiff, in which, after referring to the previous letter, the Defendant stated that he thought it best to say that it was clearly understood on his part, that the Plaintiff agreed to let the house for seven years from Michaelmas, 1870, upon certain conditions therein mentioned, some of which the Plaintiff did not admit to form part of the alleged verbal agreement:—

Held, that neither the first letter, nor the two together, constituted a memorandum in writing of the alleged agreement sufficient to satisfy the requirements of the *Statute of Frauds*.

6 Ch D 154
156,

Affirmed by 1 J & H 27 Ch 406

THIS was a suit for specific performance of an agreement to take a lease of a house. The only question argued was, whether there was a memorandum in writing of the alleged agreement sufficient to satisfy the requirements of the *Statute of Frauds*.

In March, 1870, the Defendant was tenant of a house belonging to the Plaintiff, called *Ashmount*, for a term which was to expire at Michaelmas, 1870. On the 19th of March, 1870, the Defendant called on the Plaintiff, and a conversation took place between them, in the course of which the Defendant stated that *Ashmount* was not large enough for his family; upon which the Plaintiff suggested that another house, called *Cronstadt House*, also belonging to the Plaintiff, might suit. Both parties then went and inspected *Cronstadt House*; and, according to the allegations in the bill, a verbal agreement was come to between them, whereby the Plaintiff agreed to put the house into proper tenantable repair; and the Defendant agreed, upon this being done, to take the same at the yearly rent of £120 for the term of seven years computed from Michaelmas, 1870, determinable by the executors of the Defendant at six months' notice, in the event of the death of the Defendant during the term. During the interview the Defendant, at the request of

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the Plaintiff, wrote and delivered to the Plaintiff the following letter:—

"*Ashmount, Abbey Wood*, 19th March, 1870.

"My dear Sir,—After our conversation this evening upon my exchange of residence, I agree to take *Cronstadt House* for the term of seven years on lease, subject to the condition of terminating at six months in the event of my death, at the rent of £120 per annum, on its being put into proper and tenantable repair.

"Yours faithfully,

"*R. Nesham*, Esq. *Thomas Selby*."

It was admitted that this letter of itself was insufficient to satisfy the statute, and it was proposed, on the part of the Plaintiff, to supply the defect by a letter, written by the Defendant to the Plaintiff on the 20th of March, 1870, of which the material part was as follows:—

"With reference to my note to you of last evening, which was so hastily entered upon and penned in your presence, with the suggested alteration made by your wish, I think it best, to prevent the possibility of any misunderstanding arising between us, to say that it is clearly understood on my part that you agree, on my taking a lease of *Cronstadt House* for seven years from Michaelmas next, at £120 per annum, to put it, with the out-buildings, fencing, palings, gates, &c., attached thereto, in all proper and tenantable repair as shall be approved by my own surveyors, Messrs. *Wigg & Pownell*, of 7, *Bedford Row*. I also conclude that I shall have all the accommodations that I now have here, such as a bath-room, which, if you prefer, can be taken from the house I am now occupying, with the pipes, leading, &c.; and as I did not go over the grounds, I conclude that there are the usual outdoor offices—such as coach-house, harness-room, stabling with loose box as I have here, tool-house, and conservatory heated with hot-water pipes; that the gardens will be made perfect with plants and shrubs of the same quality and description as I have just planted at *Ashmount*, or those now recently planted should be taken up and planted afresh at *Cronstadt House;* that the same quality of gravel from *Dartford* shall be laid on the garden walks, or taken from the walks at *Ashmount;* that I may be also permitted to remove all fruit trees, dung, &c., at Michaelmas, 1870, that have been planted and brought

on the premises during the past week; and that the kitchener which has been undergoing repair last week by having a new boiler, &c., put in, shall be removed and placed at *Cronstadt House;* and it must be clearly understood that the drainage must be made perfect, as I understand from several of my neighbours that it has long been in a very imperfect state, and the house is also represented to be exceedingly damp. I merely state what I am told since I saw you. In consequence of this I should wish the covenant that you purpose inserting in the lease, as to the lease being terminated at the expiration of six months in the event of my death, shall also extend to any illness of myself or family occasioned by defective drainage. . . . Subject to these conditions I am prepared to ratify what I offered you, though some of my neighbours state the rent is much too high."

On the 21st of March the Plaintiff replied to the Defendant as follows:—

"I have to acknowledge the receipt of your letter, from which it is evident to me that you have been prejudiced. In order to set your mind at rest on the point, and to shew you that I intend to act liberally to you, I enclose specification drawn up by my surveyor, Mr. *Davenport*, and from this you will at once see that the house will be put into good repair, and, in fact, all done that you could reasonably ask of me. With regard to the shrubs, I will allow you to replant all the shrubs at *Cronstadt House* planted since Christmas at *Ashmount*, and the garden shall be put into order. I shall feel much obliged if you can, without serious inconvenience, take *Cronstadt House* at Midsummer Day, when I will have it quite ready for you. I have seen Mr. *Davenport* to let, if possible, *Ashmount* by Midsummer or Michaelmas next. Please return specification when you have read same."

The Defendant returned the specification, and on or about the 5th of April, 1870, finally refused to take a lease on the terms alleged by the Plaintiff to have been agreed upon; and afterwards the bill in this suit was filed.

Mr. *Southgate*, Q.C., and Mr. *Dauney*, for the Plaintiff:—

The letter of the 19th of March does not clearly shew when the term was to commence; but we can supply the defect from the

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letter of the 20th of March. The effect of that letter may be shortly stated thus: "I admit that last night I entered into an agreement for a lease to commence at Michaelmas, 1870; but now I ask for something more." A letter may be used to supply a term in an agreement, although it is written for the purpose of repudiating the whole agreement: *Bailey* v. *Sweeting* (1). In *Verlander* v. *Codd* (2) a person by letter agreed to grant an extension of a lease, and by a subsequent letter fixed the time when the term so proposed to be extended was to expire; and it was held that the letters constituted a sufficient memorandum to satisfy the *Statute of Frauds*. In *Warner* v. *Willington* (3) the letter containing the terms of the agreement sought to be enforced did not state the name of the lessor; but it was held that the defect might be supplied by means of another letter, in which the name was mentioned.

Mr. *Fry*, Q.C., and Mr. *Chitty*, for the Defendant, were not called upon.

LORD ROMILLY, M.R.:—

I do not think that anything can be made of this case. I think it was merely negotiation between the parties. The first letter taken alone seems to me not to be one upon which specific performance of any promise could be enforced. It is very short, "After our conversation this evening upon my change of residence"—that is, there was a conversation between them upon the exchange of residence—"I agree to take *Cronstadt House* for the term of seven years on lease, subject to the condition of terminating at six months in the event of my death, at the rent of £120 per annum, on its being put into proper and tenantable repair." To take it from when? From the day on which this letter was signed? It is quite clear you must go to something else in order to have it explained what is the time which is referred to, that is, when the seven years begin to run. Then it is proposed to supply that omission from the subsequent letter. I admit that you may make out a contract from a number of letters taken together; and if the Plaintiff agrees in them to enter into a definite contract that contract will be enforced by this Court. You may get part of the

(1) 9 C. B. (N.S.) 843. (2) T. & R. 352. (3) 3 Drew. 523.

contract from one letter, and supply the period of its commencement from another letter, but you cannot do that and at the same time repudiate those parts of the other letter in which the person making the proposition introduces a number of other terms. He may say, "I am willing to take the lease from Michaelmas, but at the same time I understand that the repairs are to be determined by my surveyor; that there is to be a warm bath; that there is to be a gravel of a particular quality; and that there are to be plants of a particular sort." If the lessor acts upon that, and takes the commencement of the lease from Michaelmas, he must take the other stipulations suggested by the lessee. The lessor, in other words, cannot take as much of the letter as suits his purpose and reject the rest. Here the lessor answers to that, "With reference to putting it into proper repair, it is not to be decided by your surveyors but by my surveyors; as to the plants, I will allow you to put in those you have planted since Christmas." In fact all this was only negotiation between the parties; and if a bill for specific performance is filed, it must be filed upon the enforcement of a promise contained in both letters, on which the Defendant would be entitled to have all that he stipulated for in the second letter; but that is not what the Plaintiff seeks. Then, while the matter is still in negotiation, the Defendant, not later than a few days afterwards, in the first week of April, says, "I will have nothing at all to do with it." Thereupon the bill is filed for specific performance. Courts of Equity have frequently been blamed for the manner in which in many cases a mere correspondence between the parties has been converted into a contract contrary, it is said, to their intention. In this case the Plaintiff appears to me to be in this dilemma: either the letter of the 19th of March constitutes the whole of the contract, in which case it is too vague for a Court of Equity to carry it into execution, or it is contained in the two letters of the 19th and the 20th of March; and then that is not the contract which the Plaintiff seeks to enforce; on the contrary, the Plaintiff seeks to have something taken out of it.

I am of opinion that upon this case specific performance cannot be enforced, and that the bill must be dismissed with costs.

Solicitors: Messrs. *Pearson & Lee;* Messrs. *Aldridge & Thorn.*

M. R.
1871
Dec. 16;
1872
Jan. 15.

ELSE *v.* ELSE.

[1868 E. 54.]

Vendor and Purchaser—Sale by Court of Chancery—Conditions of Sale—Condition not to Object to Title prior to Document chosen as root of Title—Prior Title bad—Specific Performance.

12 L.D. 135.

A sale was made by the Court of Chancery under conditions which precluded the purchaser from objecting to the title prior to the document chosen as root of title, and made recitals in deeds more than twenty years old conclusive. A recital covered by this condition was so framed as to conceal a defect of title prior to the date fixed for commencement of title. The purchaser inquired into the prior title, and refused to complete on the ground that the prior title was bad; and the Court being of opinion that such objection was well founded:—

Held, that, the sale being by the Court, the purchaser was not precluded by the conditions from raising the objection, and ought to be discharged from his purchase.

Whether a similar decision would be given in the case of an ordinary sale, *quære*.

HANNAH CROOKES, by her will, dated the 16th of April, 1823, devised certain real estate to trustees upon trust to let the same, and to apply the rents, issues, and profits in the maintenance and education of *William Richards* until he should attain his age of twenty-one years; and when he should have attained that age, upon trust to assign, and the testatrix thereby gave and devised the same to *Thomas Richards* and the said *William Richards*, their heirs and assigns, for ever, equally to be divided between them, share and share alike, as tenants in common; but should one of them happen to die before he arrived at the age of twenty-one years, leaving no child or children behind him lawfully begotten, then she gave, devised, and bequeathed the same unto the survivor of them, his heirs and assigns, for ever; and if it should so happen that both the said *Thomas Richards* and *William Richards* should die leaving no lawful child or children behind them, then, and in such case, she gave, devised, and bequeathed the same estate to her five nephews therein mentioned. The testatrix died shortly after the date of her will.

Thomas Richards died under twenty-one without leaving any

children. *William Richards* attained twenty-one, and in 1838 sold the property devised to him by *Hannah Crookes* to *Charles Else*, and conveyed the same to him by indentures of lease and release of the 23rd and 24th of July, 1838, in the latter of which deeds the will of *Hannah Crookes* was recited down to, but not including, the ultimate gift over. *William Richards* was still living and childless.

Charles Else died in December, 1864, and this suit was instituted for the administration of his real and personal estate. An order was made in the suit for the sale of his real estate, including the property purchased by him in 1838.

The title to such property was in due course referred to the late Mr. *Hayes*, as conveyancing counsel, who investigated the same, and was of opinion that the ultimate gift over took effect only in the event of *William Richards* dying under twenty-one without leaving children, and consequently that a good title could be made thereto by persons claiming under *Charles Else*. The property was put up for sale in lots under conditions which were settled by Mr. *Hayes*, and provided (condition 8) that the abstract should commence with indentures of lease and release dated 23rd and 24th of July, 1838, being a conveyance on a sale; (condition 9) that the purchasers should accept such commencement as a good substantive root of title, and not make any objection or requisition in respect of any prior title, or evidence of prior title, notwithstanding any recital or notice, or other disclosure of any such prior title; and (condition 15) that the purchaser should accept all recitals and statements in every abstracted deed, will, or other document dated twenty years or more prior to the day of sale as sufficient and conclusive evidence of the instruments, facts, matters, and things recited.

The purchaser of one of the lots, having ascertained the facts as to the prior title, refused to complete; and the question whether he was to be compelled to do so came before the Court on an adjourned summons.

The *Solicitor-General* (Mr. *Jessel*, Q.C.), and Mr. *Begg*, for the Plaintiffs in the suit:—

The gift over in the will of *Hannah Crookes* takes effect only in

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the event of *William Richards* dying under twenty-one; for there is an express direction to convey to *William Richards* at twenty-one; and, moreover, the true construction is so settled by authority: *Kirkpatrick* v. *Kilpatrick* (1); *Wheable* v. *Withers* (2).

But the conditions of sale preclude the purchaser from raising the objection. We admit that, even under these conditions, the Court would not force an absolutely bad title on a purchaser; but the effect of these conditions is to throw on the purchaser the burden of shewing affirmatively that the prior title is bad, and that, in the face of the authorities cited, we submit that he cannot do.

Mr. *Joshua Williams*, Q.C., for the purchaser:—

The purchaser ought not to be precluded by the conditions from objecting to the title. This is a sale by the Court, and at such sales purchases are made on the supposition that everything will be fairly disclosed. Now the conditions disclose nothing; and even the abstract furnished did not disclose the objection, for the recital of the will of *Hannah Crookes*, contained in the deed which is made the root of title, stops short just at the critical point. It will be a great blow to fair dealing if the Court forces a bad title on a purchaser under such circumstances.

Then, as to the title itself, it is said that the will of *Hannah Crookes* contains a direction to convey to *William Richards* at twenty-one; but the word used is to "assign," which means simply to put him in possession. The legal effect of the will was to vest an estate in *William Richards* at once, subject only to the interest and power of the trustees during his minority: *Boraston's Case* (3); then there is a good executory gift over in the event of *William Richards* dying without leaving children: *Doe* v. *Ewart* (4); and the event on which the gift over is to take effect is not confined to death under twenty-one, but extends to the whole period of the life of *William Richards*: *Edwards* v. *Edwards* (5); *Cotton* v. *Cotton* (6). The gift over is likely to take effect, and to take effect soon.

The *Solicitor-General*, in reply.

(1) 13 Ves. 476.
(2) 16 Sim. 505.
(3) 3 Rep. 21, a.
(4) 7 A. & E. 636.
(5) 15 Beav. 357.
(6) 23 L. J. (Ch.) 489.

Jan. 15. LORD ROMILLY, M.R.:— M. R. 1872 ELSE v. ELSE.

This case raises a question of great importance as regards the conduct and practice of the Court of Chancery. It may be that its duties sometimes conflict; and this case seems at first sight to raise a question of that description. But in reality no such conflict can ever arise if the principle on which the Court proceeds be steadily borne in mind, viz., the principle of truth, and the avoidance of all deceit, or even the semblance of a trick. The case arises thus:—

It is the duty of the Court of Chancery, on certain occasions, to sell the real property of its suitors. It is, of course, the duty of any person or any Court which takes upon itself that duty to sell the thing entrusted to it in the most advantageous manner. For this purpose conveyancers are attached to the Court of Chancery, whose duty it is, amongst other things, to prepare conditions of sale, subject to which the property is offered for sale, and to make them such as will effect its object, and conduce to producing the highest price; but in so doing they must not insert anything which may mislead or deceive an innocent *bonâ fide* purchaser. That question arises in this case in the event of the Court being of opinion that a good title cannot be shewn. The consequence is that two questions are presented to the Court.

The first question is whether the purchaser is bound by the 8th and 9th conditions of sale, under which he bought; and the second question is whether, if he is not so bound, he has got a good title to the property sold to him. I think the first question presented to me is so intimately connected with the second, that it depends so much upon it, that it will be more convenient, in the way I regard this case, to consider, first, the validity of the objection to the title, on the assumption that no condition of sale affects the question, and then to consider whether the conditions of sale preclude the purchaser from taking the objection.

The objection to the title depends upon the proper construction to be put on the will of a lady called Mrs. *Crookes*.

[His Lordship then stated the will, and continued:—]

The facts are these: *Thomas* died under twenty-one, without issue. *William Richards* attained twenty-one, and is now living, but is of an advanced age, and has no children. He was the pre-

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decessor in title of the vendor, and claimed to be owner in fee simple of the property, on the ground that the gift over on the contingency of his dying without leaving a child is limited to that event occurring during his infancy, and that, on his attaining twenty-one, he became entitled to an indefeasible estate in fee simple in the property.

I regret to say that full consideration of the words of the will, and of all the authorities which relate to the subject, compels me to come to the conclusion that the event of dying without leaving a child is not, in this will, confined to infancy, and that so to confine it would be to impart a meaning, and to add words to the will, neither of which can be found there. I am of opinion that the contingency of dying, having no child, here spoken of, means at any time, whenever that death may occur.

I think it useless to go through the authorities on this point which I have done on previous occasions—the more so as my decision on this case will bind no one, and could neither give to the vendor any title not now possessed by him, nor take away from him any right now vested in him. But I am bound to say that, having carefully reconsidered this question, which I have had before me on many previous occasions, I have come to the conclusion that the death of *William Richards*, without having a child, is not confined to that event occurring during his infancy. Having arrived at that conclusion, the next question arises, viz., whether it is open to the purchaser to take this objection. The conditions are these:—[His Lordship read them.]

The indenture of release of the 24th July, 1838, recites the will of Mrs. *Crookes*, but the recital is inaccurate, for it stops short at the gift over. I am of opinion that these conditions of sale are not such as a Court of Equity can enforce on a purchaser. They amount to a condition, in fact, to the effect that if you find you have not got the property, and cannot keep it, you shall not object. Practically this is a condition saying, that although you imagine you have been sold the fee, still, though you find that you have only bought an estate for the life of a man advanced in years, you must keep the property and pay the price, because you have been foolish enough to buy subject to such conditions of sale. The argument is, that you have shut your eyes, and have got the pro-

perty at a reduced price (which is probably true); and you therefore have run the risk of being ultimately ejected against the reduction of price. I do not mean to express any opinion as to how the Court would look at this question if it arose between two strangers.

A buyer, no doubt, knows that unusual conditions of sale are framed to meet peculiar difficulties; and these are quite fair, even where framed by the Court, if they will still, in the opinion of the Court, leave the purchaser in the complete possession of the thing he has bought, even though he does not get what is called a marketable title; but if not, the Court has no right to enter into such contests, and try to fence with and outwit purchasers, and sell on the chance of the purchaser being able to resist a suit for the recovery of the possession of the lands on a defect not disclosed to him. I am of opinion that such a condition would be bad as a fraudulent misleading condition in any sale, for it professes, or induces the buyer to believe, that the recital accurately represents the will, which it does not. But in a sale under the authority of the Court of Chancery, which, above all things, ought to teach others, and set them the example of straightforward dealing, and telling the truth, and the whole truth, such a condition under the circumstances of this case, is, in my opinion, binding on no one. No good title being shewn, and the purchaser not being bound by the conditions of sale to accept a bad one, he must be discharged from his purchase, and have his costs of the whole proceedings.

Solicitors: Mr. *J. Elliott Fox*; Messrs. *Le Riche & Son.*

M. R.
1872
Jan. 11.

CUTHBERT *v.* HARMBY.

[1868 C. 271.]

*Practice—Certificate filed while Suit defective—Taking Certificate off File—Supplemental Order—*15 & 16 *Vict., c.* 86, *s.* 52.

Where the Chief Clerk's certificate in a suit was filed after the birth of an infant who was a necessary party to the suit, but before the infant had been made a party, the Court, upon the application of all parties, and in order to avoid the expense of a supplemental suit, directed the certificate to be taken off the file.

THIS was an administration suit. A decree had been made directing various accounts and inquiries which had been prosecuted nearly to completion, when, on the 6th of November, 1871, an infant was born who became a necessary party to the suit. Subsequently, on the 30th of November, before the infant had been made a party, the Chief Clerk's certificate was filed.

Mr. *Charles Browne* said that it had been decided that under circumstances such as these the ordinary supplemental order could not be made: *Auster* v. *Haines* (1); but if the certificate were not on the file it might be made: *Egremont* v. *Thompson* (2). In order therefore to avoid the expense of a supplemental bill, he now moved on behalf of all parties that the certificate should be taken off the file.

THE MASTER OF THE ROLLS, having been informed that no one could be prejudiced by what was proposed to be done, granted the application.

Mr. *Browne* then moved for and obtained the usual supplemental order.

Solicitor: Mr. *H. Harris.*

(1) Law Rep. 4 Ch. 445.

(2) Law Rep. 4 Ch. 448.

RENNIE *v.* MORRIS.

M. R.

[1868 R. 154.]

1871 ~~ Dec. 5;

1872 ~~ Jan. 11.

Custom of Stock Exchange—Transfer of Shares—Infant Transferee—Liability of Jobber.

A jobber or dealer in shares on the *Stock Exchange* contracted to purchase the Plaintiff's shares in a company, and gave in to the Plaintiff's brokers a ticket with the name of the intended transferee, which had been passed on to him. After the execution of the transfer it was discovered that the transferee was an infant, of which neither party was previously aware; and the Plaintiff became liable for calls. In a suit by the Plaintiff against the jobber, seeking to make him liable to indemnify him in respect of the shares:—

Held, that, as by the usage of the *Stock Exchange* the jobber was, in the absence of fraud, discharged from liability when he had given the name of the transferee and paid for the shares, and as he had given all the further information required by the vendor, the suit against him could not be sustained.

THE Plaintiff, *George Rennie*, was, at the time of the transactions in question, the owner and registered holder of certain shares in *Overend, Gurney, & Co., Limited*. The Defendant, *William Morris*, was a member of the *Stock Exchange*, and a dealer and jobber in shares. The object of the suit was to make the Defendant liable in respect of thirty shares in the said company sold and transferred by the Plaintiff, but to the calls on which the Plaintiff remained liable by reason of the Defendant, who contracted for the purchase, having given the name of an infant as transferee.

On the 14th of May, 1866 (four days after the company had stopped payment), the Plaintiff's brokers offered the shares for sale in the market, and the Defendant agreed to purchase them at 5*s.* a share, and on the same day handed in a ticket, according to the usage of the *Stock Exchange*, with the name of *Robert Graham* as the intended transferee. The Plaintiff executed the transfer of the shares into the name of *Robert Graham*, and on the 21st of May the Plaintiff's brokers handed to the Defendant the transfer and share certificates, and made no objection to the name of the transferee. Neither party was aware till long afterwards that *Graham* was an infant.

The Defendant's name was never registered, and the Plaintiff's name remained on the list of shareholders.

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It appeared that, according to the established usage of the *Stock Exchange*, which was followed in the present case, a jobber or dealer in shares bought in the market, not for himself but for the purpose of re-sale, and was deemed to have fulfilled his contract with the broker of whom he purchased if, on the day preceding the settling day, called the "name-day," he furnished to the broker a ticket with the name or names of the person or persons who had contracted to purchase, and pay the price for which the same were bought, or some other marketable price, the difference (if any) being made up by the jobber. It further appeared that the ticket so handed in to the vendor's broker often passed through several hands, from the ultimate transferee or his broker to the jobber with whom the contract was made. Evidence was also given by the deputy chairman of the committee of the *Stock Exchange* of a further usage (referred to in the judgment), by which ten days were allowed by the rules of the *Stock Exchange* before the transfer was completed to enable the vendor or his broker to satisfy himself that the proposed transferee was a responsible person.

In June, 1866, a resolution was passed for the voluntary winding-up of the company, and on the 3rd of July, 1866, an order was made to continue the voluntary winding-up under the supervision of the Court. Soon afterwards the Plaintiff was settled on the list of contributories in respect of the said shares, and paid the calls that were made thereon.

In December, 1866, the Plaintiff having discovered that *Graham* was an infant, applied to the Defendant for information respecting the person who gave in his name. He referred the Plaintiff to Messrs. *Bentley & Hall*, who were the next intermediate jobbers; and it appeared that they purchased for Messrs. *Wolfenden & Gell*, of the *Manchester Stock Exchange*, who, on being applied to, said that they purchased for Mr. *Lancashire* on the *Manchester Stock Exchange*, and that he refused to give the name of his principal.

The Plaintiff filed his bill, alleging that the Defendant must be treated as the principal in the contract so entered into by him as aforesaid, and praying that the agreement for the purchase of the shares should be specifically performed; and that the Defendant might be decreed to pay to the Plaintiff the amounts which had

been paid or might be paid by him in respect of calls, and to indemnify the Plaintiff from all future liability in respect thereof.

The Defendant, by his answer, denied his liability.

Mr. *Southgate*, Q.C., and Mr. *Bagshawe*, for the Plaintiff:—

The contract having been made with the Defendant for the sale of the shares, which is undisputed, the Plaintiff is entitled to call upon him to complete it, as he has failed to give in the name of a responsible purchaser. He might have elected to take the shares himself, but instead of that he gave in the name of an infant as transferee. He cannot discharge himself of his liability unless he can shew some usage of the *Stock Exchange* which clearly exonerates him. This, we submit, he has failed to do. Where the substituted purchaser is unable to contract, then the original contracting party remains liable.

The usage of the *Stock Exchange* in such cases was fully considered in the case of *Grissell* v. *Bristowe* (1), where it was held that the final buyers of shares were at liberty to transfer the contract to any sufficient buyer who would take them, and would then be released from liability; but that case is no authority for exonerating a jobber when he has given the name of an infant as transferee.

Here the vendor has become liable for calls, for which he is entitled to be indemnified by the jobber. The same principle was recognised in *Hawkins* v. *Maltby* (2); *Castellan* v. *Hobson* (3); *Hogkinson* v. *Kelly* (4); and *Maxted* v. *Morris* (5).

Sir *R. Baggallay*, Q.C., Mr. *Macnamara*, and Mr. *Higgins*, for the Defendant:—

This case is governed by the authority of *Maxted* v. *Paine* (second action) (6), where the majority of the Court held that a jobber who had purchased shares had fulfilled his obligation by passing in a name to which no objection was taken within the time limited by the usage of the *Stock Exchange*, and that in the absence of fraud

(1) Law Rep. 4 C. P. 36.
(2) Ibid. 6 Eq. 505; Ibid. 4 Ch. 200.
(3) Law Rep. 10 Eq. 47.
(4) Ibid. 6 Eq. 496.
(5) 21 L. T. (N. S.) 535.
(6) Law Rep. 6 Ex. 132.

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he could not be treated as an ultimate buyer for himself or be made liable for calls.

That decision is directly applicable to the present case. There may be many intermediate purchasers between the jobber and the ultimate purchaser, and the jobber cannot be held liable for not inquiring into the responsibility of the person whose name is given him to hand in. There are ten days allowed by the rules of the *Stock Exchange* for the vendor to make inquiries. After that time the liability of the jobber is at an end. It does not, however, follow that the ultimate purchaser is not liable, but we contend that by the custom of the *Stock Exchange*, as well as upon principles and authority, the present suit cannot be sustained.

Mr. *Southgate*, in reply:—

The case of *Maxted* v. *Paine* (1), relied on by the Defendant's counsel, is not an authority in their favour, as the facts were different, the transferee there being a person capable of contracting. There is no usage of the *Stock Exchange* which affects the Plaintiff's right to indemnify, and his remedy is not barred by lapse of time.

1872

Jan. 11. LORD ROMILLY, M.R., after stating the facts of the case, continued:—

There is no doubt that the Defendant acted *bonâ fide;* nor is any charge of fraud or collusion alleged against him. He bought and sold according to the established usage of the *Stock Exchange.* According to that usage, by which all members and all persons employing members of the said *Stock Exchange* for the purpose of buying and selling shares are bound, a jobber or dealer does not buy shares for his own account or for the purpose of taking a transfer of the same to himself, but for a re-sale, and is held to have fulfilled his contract with the broker from whom he buys if, on a day preceding the settling day on which the contract is to be completed, and called the "name-day," he furnishes to such broker the name or names of a certain person or certain persons, who will receive a transfer or transfers of the shares which he

(1) Law Rep. 6 Ex. 132.

contracted to purchase, and pay the price for which the same were bought, or some other marketable price for the said shares, the difference being made up by the jobber. According to the said usage a broker, who has purchased shares for a particular settling day, issues on the preceding name-day to the jobber from whom he purchased a ticket bearing his own name and address, and the name and address of the person or persons to whom the shares bought by him were to be transferred, with the price at which they were bought. Such jobber on the same day passes on this ticket to any jobber from whom he may have purchased as many of the shares in the same company for the same day; and it so passes from hand to hand until it is delivered by the jobber who has purchased so many shares from a broker to that broker. The last-mentioned broker then fills up a transfer in a printed form, inserting the name of his principal as transferor, and the name so given to him as transferee, and the price specified on the ticket as the consideration money for the transfer; and his principal having executed the transfer, he, on or within a reasonable time after the settling day, delivers it to the broker whose ticket was so passed, together with the share certificates, and receives from him the price specified on the ticket. If the price payable by the transferee should be less than the price at which the shares were originally sold, the difference between these prices would be paid to, or settled in account with, the broker of the transferor by the jobber to whom he sold.

There is also a practice on the *Stock Exchange* which it is desirable to refer to in order to shew that it was not resorted to here, which is thus described in the evidence: "According to the said usage, and by the rules of the said *Stock Exchange*, ten days are allowed to the seller, that is the transferor, of registered shares for their delivery, during which time he can make inquiry as to the *bona fides* of the transaction, and the status of the intended transferee of the shares whose name may have been handed to him in manner hereinbefore described. The jobber or other middleman has no opportunity for making such inquiry, as immediately he receives the name he must pass it on. In the absence of any special bargain for indemnity, it is the duty of the seller, for his own protection, to inquire into and ascertain the *bona fides* of the trans-

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action and status of such transferee before accepting him and handing transfers of the shares to him. If the broker wishes to secure the registration of the shares, he makes a special bargain with the jobber in express terms to that effect, known as 'guarantee of registration;' but in that case the price offered by the jobber is often very considerably below the ordinary market price."

It remains to apply the usage of the *Stock Exchange* (which, where it does not contravene any of the existing laws of this realm, is the law of this Court in these cases) to the facts which occurred in this case.

[His Lordship then stated the facts in detail, and continued:—]

This, I think, makes the matter, and the course to be pursued by a vendor of shares in such circumstances as the present, quite clear.

Shares are sold by the Plaintiff to the Defendant without any guaranteed registration. The purchaser turns out to be an infant. The seller, through his broker, applies to the jobber who bought from his broker, and the jobber who bought refers to the broker who bought from him. The broker, when so applied to, either gives up the name of his principal, that is, the person who instructed him to buy, or he refuses so to do. If he gives up the name of the person from whom he received such instructions, that person is the person liable to make good the loss to the vendor, and the brokers on both sides and all the intermediate jobbers (assuming always an absence of fraud) are perfectly exempt from all liability, and cannot be touched—assuming, of course, that they give all the information in their power. If the broker refuses to give the name of his principal, or all the requisite information in his power, then a bill in Chancery is necessary to compel this disclosure from him; and the costs of this proceeding would fall upon the person withholding the information. To apply that to the present case, the application is first properly made to the Defendant, who refers them to Messrs. *Bentley & Hall.* Here the case is complicated by the circumstance that they bought for brokers on the *Manchester Stock Exchange,* viz., Messrs. *Wolfenden & Gell.* Thereupon Messrs. *Wolfenden & Gell* are applied to, and they give all the information in their power; they say that they

bought for Mr. *Lancashire*, a broker of the *Manchester Stock Exchange*, and that he refuses to give up the name of his principal. Here the Plaintiff stops, but clearly erroneously; he ought to have applied to Mr. *Lancashire*, and if Mr. *Lancashire* had refused to give up the principal, he should have instituted this suit against him to compel him to disclose the real purchaser, or if not to take the consequences upon himself as the real purchaser, and to make good the Plaintiff's losses, and also indemnify him against future payments. But in no case, in my opinion, is any one of the intermediate purchasers who tell all they know liable to the Plaintiff. Were a different course to be adopted, and were this Court to make the person who entered into the immediate contract liable, it is clear that the matter would give rise to as many suits as there were jobbers in the transaction; and so in every *Stock Exchange* transaction every jobber would be liable to his vendor *toties quoties*, until at last you got to the original broker, and from him to the person who employed him.

The usage of the *Stock Exchange* very properly obviates this necessity; and as it is clear that the person who is the real purchaser, and gave the first instructions, would be ultimately liable, it puts an end to the multiplicity of suits brought to make each person liable to his vendor. Such a course would be wholly opposed to the real principles of equity, which aims at shortening litigation; and, on the same principle, the custom jumps over the heads of the innocent persons, and makes the real delinquent the person primarily and exclusively liable.

I am also of opinion that all the cases that bear on this subject support this view of the case, and that the Defendant can in no respect be made liable for the loss sustained by the Plaintiff, from the circumstance that Mr. *Lancashire*, either for himself or for some client, thought fit to buy thirty *Overend, Gurney, & Co.*, shares in the name of a boy incapable of entering into a contract. If I am right, this suit is misconceived; it is addressed against the wrong Defendant, and it must be dismissed with costs.

Solicitors for the Plaintiff: Messrs. *Parker & Clarke.*
Solicitor for the Defendant: Mr. *J. Tucker.*

V.-C. M.
1871
Nov. 22.

EARL OF CORK *v.* RUSSELL.

[1870 C. 44.]

Foreclosure Suit—Necessary Parties—Judgment Creditors—Costs.

In a foreclosure suit by mortgagees, judgment creditors, who had not issued execution, were made Defendants:—

Held, that they were unnecessary parties, and having disclaimed all interest upon being served with copy of the bill, they were dismissed with costs.

Other judgment creditors were made Defendants, who, after issuing execution, had assigned away all their interests before bill filed, and disclaimed by their answer:—

Held, that they were entitled to their costs.

Mildred v. *Austin* (1) disapproved of.

THIS was a foreclosure suit.

The first Defendant was the mortgagor, Sir *William Russell*. The next Defendants were Messrs. *Bowley*, *Winterbotham*, *Marling*, and *Jewsbury*, who were second mortgagees. Then followed Messrs. *Kinnaird*, *Murdock*, *Bouverie*, and *C. Murdock*, who were judgment creditors, and had issued executions upon their judgments, but had assigned their interests to a third party, and claimed no interest in the matters in question. These Defendants disclaimed by their answer.

The next Defendant, *C. Neilson*, was a judgment creditor, but no writ of execution had ever been issued under such judgment. He therefore submitted that at the time of filing the bill he was not a necessary party to the suit. Immediately after service of the bill upon this Defendant, his solicitors wrote to the Plaintiff's solicitor the following letter:—"Dear Sir,—There is an error in the 9th paragraph of this bill in stating that our client, Mr. *Neilson*, has issued and registered a writ of execution. We also take this opportunity of mentioning that he disclaims all interest in the property comprised in your client's security."

Notwithstanding this letter the Defendant *Neilson* was served with interrogatories, and required to answer the bill. He now, by his answer, disclaimed all interest whatever in the mortgaged

(1) Law Rep. 8 Eq. 220.

premises, and craved, under the circumstances, to be dismissed, with costs to be paid by the Plaintiffs.

The next Defendants, Messrs. *Smith, Harford,* and *Sewell,* were equitable mortgagees of the property in question in the suit, but a transfer of their mortgage had been made to the Plaintiffs on the 2nd of December, 1868, before bill filed, in consideration of the money due upon such mortgage being paid to them by the Plaintiffs. They stated that they had not and did not claim, and except during the time when they held the before-mentioned mortgage which was so transferred as aforesaid to the Plaintiffs before the institution of the suit, they never had, or claimed to have, any right or interest in any of the matters in question; and they disclaimed all right, title, and interest, legal or equitable, in any of the said matters; and they said that if they had been applied to by the Plaintiffs before the filing of the bill they would have disclaimed all such right, title, and interest; and they submitted that the bill ought to be dismissed as against them with costs.

The next Defendants, the *English Joint Stock Bank,* were in the course of being wound up. They were judgment creditors who had issued out execution on their judgment, but they did not ask for costs.

The last Defendant, *Andrew Lawrie,* was a third mortgagee. By his answer, after answering all the interrogatories, he said that the Plaintiffs must have well known that he was unable to answer a greater portion of the bill, and submitted that the Plaintiffs ought not to have called upon him to answer as to the matters comprised in the bill, except as to the first paragraph, and ought therefore to pay the costs he had thus been put to.

All the judgments were recovered subsequently to the statute 27 & 28 Vict. c. 112.

Mr. *Glasse,* Q.C., and Mr. *Dixon,* for the Plaintiffs:—

The Plaintiffs are, at any rate, entitled to a decree of foreclosure; the only question therefore is, whether any of the Defendants are entitled to their costs. It is stated in *Morgan & Davey's* book on Costs (1), that a disclaiming Defendant, if brought to a hearing,

(1) Page 80.

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will be dismissed with or without costs, according to the form and extent of his disclaimer.

In *Ford* v. *Earl of Chesterfield* (1) a judgment creditor, who had not issued execution and who had been made Defendant, was held not to be entitled to his costs, because he had not disclaimed, or offered to disclaim, before the filing of the bill. The rules of the Court on this point are there stated by the Master of the Rolls.

First: Where a Defendant disclaims in such a manner as to shew that he never had or never claimed an interest at or after the filing of the bill, then he is entitled to his costs. Secondly: If a Defendant having an interest shews that he disclaimed, or offered to disclaim, before the institution of the suit, then also he is entitled to his costs. Thirdly: Where a Defendant having an interest allows himself to be made a party to the suit, and does not disclaim, or offer to disclaim, before he puts in his answer or disclaimer—in that case he is not entitled to his costs. These rules were approved of by Vice-Chancellor *Wood* in *Bellamy* v. *Brickenden* (2). In *Ohrly* v. *Jenkins* (3) the Defendant omitted to say that he never claimed, and was therefore dismissed without costs.

In *Talbot* v. *Kempshead* (4) parties were properly made Defendants to a suit in the first instance, and afterwards gave notice to the Plaintiff that they did not claim any interest; they were held not to be entitled to their costs, notwithstanding such notice was given before putting in their answer. They should have gone on to offer their consent to have the bill dismissed against them without costs up to the date of such notice; and it rests with the Defendants to offer such consent, and not with the Plaintiffs to ask it.

Some of these Defendants are judgment creditors who had not issued execution. They disclaim by their answer, but that will not entitle them to costs. We submit that they were necessary parties to the suit. This was decided by the Master of the Rolls in *Mildred* v. *Austin* (5), who held that judgment creditors of a mortgagor,

(1) 16 Beav. 516.
(2) 4 K. & J. 670.
(3) 1 De G. & Sm. 543.
(4) 4 K. & J. 93.
(5) Law Rep. 8 Eq. 220.

whose judgments did not affect the mortgaged land at the date of the decree in a foreclosure suit, were entitled to redeem if they acquired a charge on the land by issuing writs of *elegit* and obtaining a return from the sheriff within six months from the date of the decree. This case followed *Guest* v. *Cowbridge Railway Company* (1), where it was held that a judgment creditor might, after putting the writ in the hands of the sheriff, have a right to file a bill.

The rule was also laid down in *Maxwell* v. *Wightwick* (2), that if a Defendant is not content with simply disclaiming, but puts in an answer and appears for the purpose of claiming his costs, he will not be entitled to any costs. A judgment creditor has still a lien upon the land, though he cannot enforce it until he has gone through the formalities pointed out by the statute 27 & 28 Vict. c. 112, which does not repeal the Act of 1 & 2 Vict. c. 110.

Upon these authorities, therefore, we contend that none of these Defendants are entitled to their costs. If they had an interest in the land they should have disclaimed before the institution of the suit; and if they had no interest in the land, but allowed themselves to be made parties to the suit without disclaiming before the bill was filed, they could not have their costs; and it was for the Defendants themselves to offer their consent to have the bill dismissed against them without costs up to the date of their notice.

Mr. *Raikes*, for the first Defendant, Sir *W. Russell*.

Mr. *Owen*, for the Defendant *Neilson*, the judgment creditor, who had not issued any writ of execution upon his judgment:—

There was no reason whatever why this Defendant should have been made a party to the suit. It is expressly enacted by the 27 & 28 Vict. c. 112, that no judgment shall affect any land until such land shall have been actually delivered in execution by virtue of a writ of *elegit* in pursuance of such judgment. In *In re Bailey's Trusts*, before your Honour on the 12th of February, 1869, your Honour decided that judgment creditors who had not issued execution had no interest in the land; consequently, having no

(1) Law Rep. 6 Eq. 619. (2) Law Rep. 3 Eq. 210.

(3) W.N. (1869) 63: 17 W.R. 243.

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interest in the land, and having disclaimed previously to putting in his answer, this Defendant ought to be paid his costs.

Mr. *A. T. Watson*, for the Defendants *Smith*, *Harford*, and *Sewell*:—

These Defendants had assigned away all right under their security before the institution of the suit, and they were consequently unnecessary parties to the suit; and having disclaimed, they ought to be dismissed with costs.

Mr. *T. A. Roberts*, for the Defendant, *Andrew Lawrie*, a third mortgagee:—

The ordinary form of decree as against this Defendant would direct that his costs should be added to his security; but it is submitted that in consequence of the Plaintiffs having improperly required him to answer interrogatories respecting matters of which they knew he was entirely ignorant, the costs occasioned by such a course ought to be paid by the Plaintiffs.

The other Defendants did not appear by counsel at the hearing.

Mr. *Glasse*, in reply.

SIR R. MALINS, V.C.:—

This is a foreclosure suit by the Plaintiffs, as mortgagees, against Sir *William Russell* and his subsequent incumbrancers. Among the incumbrancers are some persons in the same position as Mr. *Neilson*, who is a judgment creditor of *Russell*, and has not issued execution upon the judgment. The suit raises a question whether, as the law stands, it is necessary or proper to make mere judgment creditors parties to a foreclosure suit. I expressed my opinion upon this subject in the case of *In re Bailey's Trusts*. This decision was referred to by the Master of the Rolls in *Mildred* v. *Austin* (1). In that case judgment creditors of the mortgagor who had not issued writs of *elegit* were made Defendants by amendment at the suggestion of the Court, and his Lordship decreed that any of the judgment creditors who should have acquired a charge on the

(1) Law Rep. 8 Eq. 220.

land at the end of six months from the date of the decree must be allowed to redeem. The ground of the decision was, that any judgment creditor might acquire a charge on the land before the time for redemption, and thereby put himself in a position to redeem; but so might any other creditor. In giving judgment the Master of the Rolls referred to my decision in *In re Bailey's Trusts*, and said it was a case of the immediate distribution of a fund in Court, in which the judgment creditors had not acquired any interest. What I decided was that, as it was necessary since the passing of the Act of 1864, before a judgment affected any land, that the land should have been actually delivered in execution by virtue of a writ of *elegit*, which had not been done in that case, judgment creditors who had not issued execution had no interest in the land, and consequently were not necessary parties to a foreclosure suit.

From the reference made to my decision in that case by the Master of the Rolls, I do not think that his Lordship could have been correctly informed of what my decision was. All I can say is, that I am bound by the Act of Parliament, notwithstanding any decision to a different effect. Now we know that up to the passing of the 27 & 28 Vict. c. 112, a judgment creditor had a lien on land, the consequence of which was that being a mortgagee he was a necessary party to a foreclosure decree. That was found to be a great inconvenience, because judgment creditors are sometimes very numerous, and to remedy this inconvenience the Legislature interfered by this Act of Parliament, the preamble of which recites that it was desirable to assimilate the law affecting freehold, copyhold, and leasehold estates to that affecting purely personal estates in respect of future judgments, statutes, and recognizances. Then by the first section it is enacted that no judgment, statute, or recognizance to be entered up after the passing of the Act shall affect any land (of whatever tenure) until such land shall have been actually delivered in execution by virtue of a writ of *elegit* or other lawful authority, in pursuance of such judgment, statute, or recognizance.

It has been argued that notwithstanding this statute the judgment creditor has an interest in land because the Act of 1 & 2 Vict. c. 110, is not repealed. Now it is not necessary that a previous

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Act should be repealed if the statute contains enactments in direct opposition to the previous Act. This latter statute sufficiently shews the intention to repeal the previous Act.

My opinion, therefore, is, that a judgment creditor who has not issued execution has no interest in the land; and the object in a foreclosure suit being to bring before the Court those only who have an interest, it is evidently improper to make these judgment creditors parties. The Master of the Rolls took a different view of the case, and I cannot say that I concur in his decision. At any rate, I am bound by the Act of Parliament, and I cannot help deciding that it was improper to make these persons parties to the suit.

Then comes the question as to their right to costs. The rules as to discriminating when costs are to be paid are rather intricate. I will take, in the first place, the case of Mr. *Neilson*. He claims to be paid his costs on the general rule that he is not a proper party to the suit, and because before he put in his answer his solicitor wrote to the Plaintiff's solicitor, stating, "We also take this opportunity of mentioning that Mr. *Neilson* disclaims all interest in the property comprised in your client's security." Therefore, independently of the general question, *Neilson* having, before any costs were incurred, said that he did not claim any interest in the property, he must have his costs.

The next Defendants who claim costs are Messrs. *Smith*, *Harford* and *Sewell*, who disclaim by their answer; and if their case was simply that of judgment creditors who had not issued execution, being made parties in accordance with a decision of one of the Judges, then I think, according to the rules of this Court, the Plaintiffs would have been justified in making them parties, and I could not order the Plaintiffs to pay their costs, because they had acted in pursuance of that decision; but there is a further question raised, whether the disclaimer they have put in is sufficient. These Defendants say they had assigned away all their right prior to the institution of the suit, and they disclaim in these terms: "We have not and do not claim, and except during the time when we held the beforementioned mortgage which was so transferred as aforesaid before the institution of the suit, we never had, or claimed to have, any right or interest in any of the matters in

question; and we disclaim all right, title, and interest, legal or equitable, in any of the said matters; and if we had been applied to by the Plaintiffs before the filing of the bill we should have disclaimed all such right, title, and interest." They therefore submit that they ought to be dismissed with costs. My opinion is that these Defendants, having disclaimed in the form I have stated, are entitled to their costs, and I think they are also entitled to their costs on principle—that a man, being made party to a Chancery suit in respect of a matter in which he has no interest, should not have to pay costs.

Then as to the subsequent mortgagee, *Andrew Lawrie*, he, as a matter of course, would pay his costs and add them to his security; but he says that he ought not to pay the whole of the costs, because the Plaintiffs should not have called upon him to answer interrogatories in respect of matters which he was entirely ignorant of, and that the Plaintiffs knew he was not acquainted with any of the facts except those contained in the first interrogatory. I can see no reason why the Plaintiffs did not distinguish which interrogatories were to be answered by this Defendant; but, on the other hand, the pleader was not obliged to answer such as he knew to be unimportant; and if the Plaintiffs had excepted to the answer on that ground, then the Defendant would have gone out with his costs of exceptions. Therefore neither of the parties was free from blame, and I cannot distinguish the costs. Mr. *Lawrie* must pay his costs and add them to his security.

A discussion having arisen between the parties subsequently to the above decision, the case was spoken to on the minutes, and a decree to the following effect was eventually drawn up:—

That the bill be dismissed as against the Defendants *Kinnaird*, *Murdock*, *Bouverie*, and *C. Murdock*, the *Joint Stock Bank*, and *F. C. Jewsbury*, without costs, and as against the Defendants *Neilson*, *Smith*, *Harford*, and *Sewell*, with costs, to be taxed and paid by the Plaintiffs; That an account be taken of what is due to the Plaintiffs under their mortgage, and for their costs of this suit, including in such costs what the Plaintiffs should have so paid for the costs of the Defendants *Neilson*, *Smith*, *Harford*, and *Sewell*; and that the total amount due to the Plaintiffs be certified.

And, further, that upon the Defendants *Bowley*, *Winterbotham*, *Marling*, and *Lawrie*, or some or one of them, paying to the Plaintiffs what should be so

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certified to be due to the Plaintiffs, within six months after the date of the Chief Clerk's certificate, the Plaintiffs should convey the premises comprised in the said mortgage security free from incumbrances, and deliver up, upon oath, all deeds and writings in their custody or power relating thereto to the Defendants *Bowley*, *Winterbotham*, *Marling*, and *Lawrie*, or to such one or more of them as should so redeem the Plaintiffs; and in default of the Defendants *Bowley*, *Winterbotham*, *Marling*, and *Lawrie*, or any of them, paying to the Plaintiffs what should be certified to be due to them by the time aforesaid, the said Defendants should from thenceforth be absolutely debarred and foreclosed of all equity of redemption of the mortgaged premises; and any of the parties to have liberty to apply as they might be advised.

Solicitor for the Plaintiffs: Mr. *R. Dixon.*

Solicitors for the Defendants: Messrs. *Linklater, Hackwood, Addison, & Brown;* Messrs. *Waterhouse & Winterbotham;* Mr. *J. B. Batten;* Messrs. *Tompson, Pickering, & Styan;* Messrs. *Wilde, Wilde, Berger, & Moore;* Messrs. *Lawrance, Plews, Boyer, & Baker;* Mr. *A. Dobie.*

V.-C. M. 1871 *Nov.* 22, 23.

LEWIS *v.* LEWIS.

[1870 L. 137.]

Locke King's Act (17 & 18 *Vict. c.* 113) *and Amendment Act* (30 & 31 *Vict. c.* 69)—*Interest in Land—Share of Proceeds of Sale—Residuary Gift subject to Debts—Land devised upon Trusts for Conversion, whether within Locke King's Act.*

13 Ch D 356

By a settlement, dated 1831, a freehold estate was settled in trust for the husband and wife for their lives, and after the decease of the survivor, upon trust, after three months from the death of the survivor, to sell and invest the proceeds in trust for the children who should attain twenty-one; and it was declared that if the major part of the children should desire that the estate should not be sold, and should give three months' notice of such desire, the trusts for sale should determine, and the estate should be held upon the trusts following the trusts for sale; but if the children preferred that the estate should not be sold, the same should, until sale, be considered as personal estate.

The wife died in 1837. Three children attained twenty-one, and one died intestate, leaving her father her heir-at-law and sole next of kin. The father by his will, gave the third part of the estate to which he so became entitled to trustees for sale, to stand possessed of the proceeds for the benefit of *A. Lewis* absolutely; and the testator devised and bequeathed the residue of his estate, whatsoever and wheresoever, to his trustees, upon trust, after payment thereout of all his debts and subject thereto, for *J. Lewis* absolutely.

After the date of his will the testator mortgaged his third part of the

settled estate, and died in 1870. The settled estate was afterwards sold under the trust in the settlement:—

Held, that the interest given by the testator in the one-third of the settled estate was not an "interest in land" within the meaning of *Locke King's Act*, and consequently that the mortgage debt must be paid out of the residuary estate:

Held, also, that if it had been an interest in land within the Act, the residuary gift of real and personal estate, subject to payment of debts, would not have been a sufficient expression of a "contrary intention" to have exonerated the mortgaged estate.

Semble, that land devised upon trusts for conversion, and taken in its converted state, is not an "interest in land" within *Locke King's Act*.

BY a settlement, dated the 5th of July, 1831, a messuage and farm, called the *Leckford* estate, in *Hants*, were settled in favour of *John* and *Elizabeth Lewis*, for their lives, and, after the decease of the survivor, to the use of trustees, upon trust, after three months from the death of the survivor of *John* and *Elizabeth Lewis*, to sell the said hereditaments, and to invest the proceeds in the purchase of public funds, or Government or real securities, to be held in trust for the children of *Elizabeth Lewis*, as she should appoint, and, in default of appointment, in trust for all her children who, being a son or sons, should attain twenty-one, or die under that age, leaving issue, or being a daughter or daughters, should attain that age or marry. And it was declared that if the major number of the children who should survive the said *John* and *Elizabeth Lewis*, and should have attained twenty-one, should desire that the said hereditaments should not be sold, and of such desire should give notice in writing, the aforesaid trust for sale should determine, and the hereditaments should be held upon the same trusts and subject to such of the powers immediately following the trusts for sale as should be then subsisting and capable of taking effect. And it was provided that if the children should prefer that the hereditaments should be sold the same should, until sold, be considered as personal estate.

Elizabeth Lewis died in November, 1837, without having executed the power of appointment amongst her children; and having had eight children by *John Lewis*, five of whom died under age and without having been married, and the other three of whom, that is to say, *Leonard John Lewis*, *Elfrida Lewis*, and *Ellen Ann Lewis*, attained the age of twenty-one.

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Ellen Ann Lewis died in March, 1861, intestate and a spinster, leaving her father, *John Lewis*, her heir-at-law and sole next of kin.

John Lewis, the father, by his will, dated the 11th of December, 1862, after appointing the Plaintiffs to be his executors, devised and bequeathed as follows:—

"I give, devise, and bequeath unto the said *Anthony Lewis* and *Joseph Dowling* all that one undivided third part or share in an estate known as the *Leckford* estate, or in the funds arising from the sale thereof, which I inherited or became entitled to on the death of my daughter, *Ellen Ann*, to hold the same unto the said *Anthony Lewis* and *Joseph Dowling*, their heirs, executors, administrators, and assigns, according to the nature and quality thereof, upon trust, if the said one-third part or share is not sold in due time after my decease, with the entirety of the said estates under the existing trusts for the sale thereof, that they, the said *Anthony Lewis* and *Joseph Dowling*, and the survivor of them, and the heirs, executors, or administrators of such survivor, their or his assigns, do and shall, when and as they in their absolute discretion shall think fit, sell and absolutely dispose of the said undivided third part of the said *Leckford* estate." And the testator directed that the proceeds of the sale of the said undivided third part should be invested by his trustees in the purchase of public funds or government or real securities; and subject to the payment of an annuity to *Sarah Cole* (described as the mother of his son *Albert Lewis, alias Cole*), the testator directed that his trustees should stand possessed of the said trust moneys, stocks, funds, and securities, upon trust for *Albert Lewis* absolutely; but in case of his death under twenty-one, then in trust for his the testator's son, *John Leonard Lewis*, and his daughter, *Elfrida Lewis*, as tenants in common; and the testator devised and bequeathed all the rest, residue and remainder of his estate and effects whatsoever and wheresoever situate, including securities for money, to his trustees, to hold the same to them, their heirs, executors, administrators, and assigns, according to the nature and qualities thereof respectively, upon trust, after payment thereout of all his just debts, funeral and testamentary expenses, and subject thereto, for his son, *John Leonard Lewis* absolutely.

The one undivided third share in the *Leckford* estate, or of the

proceeds thereof, so disposed of by the testator's will, was, at the time of making his will, free from incumbrances, but subsequently to the date of his will, and on the 12th of August, 1863, the testator and his son, *John Leonard Lewis*, joined in mortgaging the testator's life interest and his one-third share in the reversion of the estate, together with other property, to *William Conway*, for the sum of £1500; and the testator subsequently mortgaged the same property to *Charles King* for a sum of £450.

The testator died on the 14th of February, 1870, leaving *John Leonard Lewis* and *Elfrida Lewis*, his only children, and also leaving *Sarah Cole* and *Albert Lewis* him surviving.

No notice was given to the trustees of the settlement by *John Leonard Lewis* and *Elfrida Lewis* of any desire that the settled hereditaments should not be sold, but, on the contrary, they had given their consent to the sale, and the *Leckford* estate had in fact been sold.

Questions had arisen between the parties as to the fund out of which the mortgages charged upon the third share of the testator in the settled estate were to be paid. The bill was therefore filed by the trustees of the will, praying that it might be declared whether, by the effect of the indenture of settlement and the will of the testator, *John Lewis*, the undivided third part or share to which he had become entitled on the death of his daughter, *Ellen Ann Lewis*, was at the time of his death to be considered as personal estate, or whether the testator had, at the time of his death, an estate or interest in land in respect of such undivided third part; and whether the mortgage debts were payable out of the one undivided third part or share, or out of the proceeds of the sale thereof, or whether the same debts were payable out of the residuary personal estate of the testator.

Mr. *E. G. White*, for the trustees, stated the question which had arisen between the parties for the decision of the Court.

Mr. *Glasse*, Q.C., and Mr. *Lindley*, for *John Leonard Lewis*, the residuary legatee:—

The only question in the case is, whether this is such an interest in land as to bring it within the meaning of *Locke King's Act*

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(17 & 18 Vict. c. 113). It may be assumed against us that there is a conversion; but that has nothing to do with the question, for still we say that the mortgage debts are chargeable upon the mortgaged property, or the proceeds of the sale of that property, and are not payable out of the residuary personal estate. The Act says that, when any person shall die seised of or entitled to any estate or interest in land or other hereditaments, which shall at the time of his death be charged with the payment of any sum or sums of money by way of mortgage, then the debt shall be borne by the mortgaged estate.

The question therefore is, whether this third share in the estate is such an estate or interest in land as comes within the meaning of that Act. It is quite true that the settlement directed the estate to be sold unless the parties preferred that it should not be converted; but that does not make it cease to be an interest in land. If the land was not converted it would be taken as freehold land; but even if it were, by the desire of the parties, converted, still it would come within the words of the Act—"When any person shall die seised of or entitled to any estate or interest in land." Under the *Mortmain Act* this would clearly be an interest in land, and we submit that it comes equally within the meaning of this Act. Then being an interest in land, has the testator shewn any contrary intention to take it out of the words of the Act? Under the decisions upon the construction of this Act prior to the *Amendment Act* (30 & 31 Vict. c. 69) a general direction to pay debts out of personal estate was held to be a sufficient indication of a contrary intention within the meaning of the Act, as in *Mellish* v. *Vallins* (1); *Eno* v. *Tatham* (2); but the *Amendment Act* reversed all these decisions by enacting that a general direction to pay debts out of personal estate should not be deemed to be an expression of an intention contrary to the rule established by the previous Act. Here the testator gives the residue of his estate upon trust, after payment thereout of all his just debts, funeral and testamentary expenses, and subject thereto, for his son *John Leonard Lewis* absolutely. This is just such a residuary gift as the Act is intended to guard against; consequently the mortgage debts

(1) 2 J. & H. 194. (2) 3 D. J. & S. 443.

must be borne by the property charged with them, and they cannot fall upon the residuary legatee.

In *Nelson* v. *Page* (1), Vice-Chancellor *Giffard*, in referring to the *Amendment Act*, said: "The meaning appears to be this—that if a testator wishes to give a direction which shall be deemed a declaration of an intention contrary to the rule laid down by Mr. *Locke King's Act*, it must be a direction applying to his mortgage debts in such terms as distinctly and unmistakeably to refer to or describe them."

Mr. *Cole*, Q.C., and Mr. *Kekewich*, for Mrs. *Cole* and *Albert Lewis*, the devisees of the third share:—

The question which arises under the second, or *Amendment Act*, is, whether it applies to such interests only as are included in the prior Act. This case is one in which the direction of the testator must be held to mean that the debts are to be paid out of his estate before anything else is done, as in *Maxwell* v. *Hyslop* (2), where the testator directed that the will should not affect the previous settlement of his estate, and charged his real and personal estate with payment of his debts, and subsequently charged his settled estates with a sum of £14,000 by means of a bond. It was there held that the residuary estate was liable to the payment of the £14,000 in exoneration of the settled estates. This is a similar case, as these mortgages did not exist at the time the testator made his will, and he could not have intended that the devisees of that estate should pay the mortgage debt. We contend that the two persons we represent do not fill the character of "heir or devisee" within the meaning of *Locke King's Act*, since the estate is directed to be sold and the proceeds to be paid to them. Then we contend that the property is not such as is comprised in the words "when any person shall die seised of or entitled to any estate or interest in land or other hereditaments." This property is directed to be converted, and the gift is of a third part of the proceeds of the land, and is not such an interest in land as the Act intends to include, which is evidently such an interest in land as constitutes land itself. But even if it were property coming under

(1) Law Rep. 7 Eq. 25.

(2) Law Rep. 4 Eq. 407; on appeal, Ibid. 4 H. L. 506.

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the definition of "land or other hereditaments," and if it had come by descent, yet in this case *Locke King's Act* does not apply, as the testator has given direction for payment of his debts out of a particular fund, namely, the residuary estate, which takes the case out of those authorities in which there is a general direction to pay debts.

This view was taken by your Honour in *Maxwell* v. *Hyslop* (1), where the debts were to be paid out of the "residuary real and personal estate." Here they are to be paid out of "all the rest, residue, and remainder of his estate and effects whatsoever, and wheresoever situate." The residuary real and personal estate is therefore the primary fund for payment of debts. This was also held in *Allen* v. *Allen* (2), where all debts, funeral and testamentary expenses, were directed to be paid out of residuary real and personal estate, and it was held that a mortgage on one of the testator's estates was primarily payable out of the residue: *Stone* v. *Parker* (3).; *Mellish* v. *Vallins* (4); *Eno* v. *Tatham* (5).

[The VICE-CHANCELLOR:—The *Amendment Act* has done away with those decisions. A higher authority—that of Parliament—has decided that the case of *Eno* v. *Tatham* is not to be considered as law.]

But here we say there is more than a general direction to pay debts out of personal estate, and that, by the terms of this residuary clause, a contrary intention is expressed within the meaning of the Act, and consequently that these mortgage debts must be paid out of the residue.

Mr. *Glasse*, in reply, cited *Rolfe* v. *Perry* (6). He also submitted that the father, during his life, might have filed a bill for partition of the freehold estate.

SIR R. MALINS, V.C.:—

This is a case of great nicety. It arises in this way. Under the settlement of the 5th of July, 1831, there was a power for the children to retain in specie the property settled upon them after

(1) Law Rep. 4 Eq. 407.
(2) 30 Beav. 395.
(3) 1 De. & Sm. 212.
(4) 2 J. & H. 194.
(5) 3 D. J. & S. 443.
(6) Ibid. 481.

the death of Mr. and Mrs. *Lewis*, the consequence of which is that each of the children took an interest in an aliquot part of the produce of the estate, and, under the terms of the settlement, they took it as personal estate. There were three children. One of them, *Ellen*, having attained twenty-one, and having thereby acquired an interest in one-third of the produce of the estate, died intestate, leaving her father, *John Lewis*, her heir-at-law and sole next of kin, and in him vested the right to such one-third. In what capacity did he take this third? Not as heir-at-law, for her interest was an interest in personal estate, and if she had left a will it would have been transmitted to her executors, but as she died intestate it went to her next of kin as personal estate, and the father took it as such. It appears that the father had an illegitimate son by a woman named *Cole;* and he had two legitimate children, and, being desirous of providing for his illegitimate child, he made his will in the form above stated. At this time he could not be certain in what state the property would be enjoyed, because if he and his other two children had concurred in retaining the property in specie, it would have been freehold estate. The will was dated in 1862, and in the following year the testator mortgaged his third part of the estate, and again in 1867 he created a second mortgage, and died in 1870.

The question therefore is, whether the illegitimate son takes his one-third share of the estate charged with the burthen of the mortgage debt, or whether he is entitled to have the burthen discharged out of the general personal estate. Now it is quite true that if this is an interest in land the devisee must take it subject to the burthens imposed by the testator, unless, in pursuance of the Act, he has shown a "contrary intention," and it is contended that he has done so by directing all his debts to be paid out of the residue of the estate. It is evident, upon the authorities that these words were, before the Act amending *Locke King's Act*, sufficient to indicate a "contrary intention," and that the mortgage debt would have been payable out of this fund. But the first question is, whether this is an interest in land within the meaning of Mr. *Locke King's Act*. If it is not, then the general law applies, and it was a mere bequest of a chattel subject to a charge, and the general personal estate must redeem the pledge or pay off the

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charge upon it. If, therefore, this is not an interest in land, and only a chattel, it is unnecessary to consider the matter any further. Is it, then, an interest in land within the meaning of the first of the Acts of Parliament? It was no doubt an interest in land, because it was a share in the produce of the estate, and no one can deny that that is an interest in land, neither is there any doubt that it would be so within the *Mortmain Act.* But it does not follow that it is so within the meaning of this Act. Now suppose that, instead of being an aliquot part of a sum of money, it was a specified sum, say £1000, to be paid out of the produce of the land; that would have been an interest in land, but yet it would not have been so within the meaning of this Act, for it would have been a specific bequest of a chattel, and would fall within the rule in *Knight* v. *Davis* (1), which says, that where a specific chattel is charged or pledged by the testator the specific legatee is entitled to have the charge paid off out of the general assets of the testator. Mr. *Glasse,* in reply, suggested that the father, during his life, might have filed a bill for partition, this being an estate or interest in land; but if so, such a bill must have been dismissed, because the property was converted under the original trusts of the settlement, and it could only be reconverted by the desire of the persons interested. Then, again, I am not disposed to say that the doctrine of conversion does not apply to *Locke King's Act.* My view of the Act is, that where an interest in land is given by a testator, with the option of retaining it in specie or of having it converted, the person claiming to take it without conversion must take it subject to the burthen; that is, that where there is merely a general direction for payment there is no contrary intention shown, as required by the Act. I think the person taking the estate under the will would in such a case be obliged to take the estate subject to the burthen, but then he must take it as land. Now here he takes it as money, not as land; therefore, when *Locke King's Act* says that the heir or devisee to whom the "lands or other hereditaments" shall descend or be devised, shall take subject to the mortgage debt, I interpret the Act as contemplating the taking of land as land. Here it is taken merely as personal estate, and though it is an interest in land in a certain sense, it is not an

(1) 3 My. & K. 358.

interest in land within the meaning of this Act. If I am right in this, that a person electing to take under a will an interest in land in its unconverted state must, under the Act, in the absence of a contrary intention on the part of the testator, take it *cum onere*, how can I say that the Act applies in case he elects to take it as converted, when he takes it as mere personal estate, that is, an aliquot part of the proceeds of an estate?

My opinion, therefore, is that this is not an interest in land within the meaning of the first Act, and therefore not within the *Amendment Act*. The other question raised is this: The testator has here directed that his debts generally are to be paid out of his residuary real and personal estate, and it has been argued that he has not, in so doing, shewn an intention that the mortgage debts shall be paid out of his personal estate exclusively.

If it had been an interest in land within the meaning of the principal Act, I must have held that there was an absence of any "contrary intention" on the part of the testator, within the meaning of that Act and of the *Amendment Act*, to exonerate the mortgaged estate from the mortgage debts, and I should then have agreed with Mr. *Glasse* in that part of his argument.

All I now decide is, that it is not an interest in land within the meaning of *Locke King's Act*.

It is a mortgage of a specifically devised chattel, and the general personal estate must exonerate the mortgaged estate. The costs of all parties must be paid out of the residuary personal estate, those of the trustees as between solicitor and client, with liberty to apply.

Solicitors for the Plaintiffs: Messrs. *Prior, Bigg, Church, & Adams.*

Solicitors for the Defendants: Messrs. *Brown & Waters.*

V.-C. M. 1871 Dec. 9.

In re ROBINSON & PRESTON'S BREWERY COMPANY.

SIDNEY'S CASE.

Contributory—Contract to take Shares—Signing Memorandum of Association—Acceptance of Office as Director—Resignation by Director—Lapse of Five Years.

S. in 1865 agreed to become a director of a company, and signed the memorandum of association for 200 shares. The articles of association empowered the directors to decline to commence business unless two-thirds of the capital were subscribed. *S.* attended the first meeting of the directors, and having unsuccessfully opposed a resolution to commence business before two-thirds of the capital had been subscribed, stated that he should resign his directorship; but, at the request of the directors, postponed his resignation till a further day, when it was accepted. The company carried on business and made some dividends, but was in February, 1870, ordered to be wound up. *S.* was not treated as a member of the company after his resignation, and no shares were allotted to him, and his name was never placed on the list of shareholders:—

Held, that he was not by the lapse of time, and by the circumstances of the case, exonerated from liability to take the shares for which he had subscribed the memorandum of association.

THIS was an adjourned summons to take the name of Mr. *Sidney* off the list of contributories in respect of 200 shares in *Robinson & Preston's Brewery Company, Limited.*

The company was formed in November, 1865, for the purpose of purchasing and carrying on the business of Messrs. *Robinson & Preston*, brewers at *Liverpool*, and a memorandum and articles of association were registered. The articles of association fixed as the qualification for directors the holding of 200 shares in the company; and by article 72 it was provided that the directors might commence and prosecute the object of the company notwithstanding the whole of the shares had not been issued or taken up; but that unless two-thirds of the shares should have been taken up on or before the 30th of January, 1866, the directors should not be bound to proceed with the undertaking.

The applicant stated in his affidavit that in November, 1865, the solicitor of the company called upon him and requested him to become a director of, and shareholder in, the company, saying that there was a clause in the articles of association which enabled

him to withdraw from the company in the event of less than two-thirds of the nominal capital being subscribed for. He then signed the memorandum of association for 200 shares, and agreed to become a director.

The articles of association, however, contained no such clause as alleged, and it appeared that the 72nd clause must have been intended to be referred to.

A prospectus was then issued, dated the 5th of December, 1865, in which it was stated that the company would commence business on the 1st of January, 1866. In this prospectus the name of the applicant appeared as one of the directors of the company. On the 23rd of December, 1865, the first meeting of the directors was held, the applicant being present. A resolution was proposed that the company should commence business in accordance with the prospectus, and notwithstanding that the applicant opposed the proposal, on the ground that two-thirds of the capital had not been subscribed for, it was carried, and he then stated that he would not take office as a director, and that he declined to take any shares in the company, or proceed further in its formation The meeting was then adjourned to the 26th of December, and the applicant agreed to postpone his resignation till then.

He attended the adjourned meeting of the 26th of December, and one of the other directors shewed him a list of the shares subscribed for, in which his 200 shares were not included.

On the 29th of December he wrote to the directors requesting them to accept, record, and acknowledge his resignation as a director and the receipt of that letter.

At a meeting of the directors on the 3rd of January, 1866, the resignation was accepted, and the secretary afterwards wrote to give him notice of the acceptance.

No shares were allotted to him, and from that time he was not treated as a member of the company, and though the business was carried on for several years, and dividends were made, no notice was ever taken of him.

The company was not successful, and in February, 1870, was ordered to be wound up, and the official liquidator, finding a large number of shares unallotted, placed Mr. *Sidney* on the list for 200 shares. He now applied to be struck off.

V.-C. M. 1871 SIDNEY'S CASE.

Mr. *Cotton*, Q.C., and Mr. *North*, for the applicant:—

There are two grounds on which this case is distinguishable from *Evans' Case* (1). First, Mr. *Sidney* signed the memorandum conditionally, in the belief that unless two-thirds of the capital were subscribed he was entitled to withdraw. The mis-statement was that of the company, and he withdrew as soon as he discovered the facts, and the company acquiesced in his withdrawal, and, in effect, released him; and the official liquidator, representing the company, is not entitled to dispute the release. No one is prejudiced by his withdrawal, for the creditors can only look to the register of shareholders, and cannot go to the memorandum of association. Secondly, the delay is a bar: *Sichell's Case* (2).

Mr. *Glasse*, Q.C., and Mr. *Bardswell*, for the official liquidator:—

By the 23rd section of the *Companies Act*, 1862, the moment Mr. *Sidney* signed the memorandum of association he became liable to take the shares for which he signed, and it became his duty as a director to put himself on the list: *Hall's Case* (3). Lapse of time does not affect the rights of the official liquidator. This was decided in *Levick's Case* (4), and in *Tooth's Case*, which came before the Lord Justice *Giffard*, then Vice-Chancellor, on the 23rd of November, 1868.

Mr. *Cotton*, in reply.

SIR R. MALINS, V.C.:—

This company was formed by the registration of a memorandum and articles of association in November, 1865. Mr. *Sidney* signed the memorandum of association for 200 shares, and therefore, by his own act, he became a director of the company, and was bound to know that the minimum qualification for the office was the holding of 200 shares. He states that previously to his signing the memorandum, the solicitor of the company told him that he would be free to withdraw unless two-thirds of the capital were subscribed; but it appeared that the articles of association only provided that it should not be incumbent upon the directors

(1) Law Rep. 2 Ch. 427.
(2) Ibid. 3 Ch. 119.
(3) Law Rep. 5 Ch. 707.
(4) 40 L. J. (Ch.) 180.

to go on with the company if that amount were not subscribed. Then, on the 23rd of December, knowing, as I must hold that as a director he did, that it was clearly his duty to put his own name on the list of shareholders for 200 shares, he attended the meeting of directors and opposed the resolution which was passed, but did nothing more. He then resigned the office of director, and was not subsequently treated as having anything to do with the company. Then, in 1870, the order to wind up was made, and he might well have supposed that by that time his liability was at an end.

The authorities are, however, clear that a man, by signing the memorandum of association of a company, contracts to take the number of shares for which he subscribes. In *Hall's Case* (1) it was held, that where a man had signed a memorandum for 500 shares, he was liable for the whole 500 shares, though he had actually been allotted only 250 shares.

The question of delay was considered in *Levick's Case* (2) and *Tooth's Case;* and in the latter I understand that a longer time had elapsed than in the present case. Even in *Evans' Case* (3) the Lord Justice *Cairns* expressed regret at being obliged to fix the applicant on the list on account of the time which had elapsed since he had ceased to be treated as a member of the company. And in *Levick's Case* I stated that the only fresh point raised in argument was that of delay, and I held that it was not sufficient to affect the liability incurred by signing the memorandum. I referred also to *Migotti's Case* (4) as shewing that there was no way of getting rid of this liability except by taking the shares and then making a valid transfer. I am therefore of opinion that I am bound by *Levick's Case* to hold that the official liquidator is not, by the delay which has taken place, precluded from placing Mr. *Sidney* on the list of contributories, and that his name must remain on the list for the 200 shares; and I am sorry to add that he must pay the costs of this application.

Solicitors: Messrs. *Norris & Allen;* Messrs. *Burton, Yeates, & Hart.*

(1) Law Rep. 5 Ch. 707.
(2) 40 L. J. (Ch.) 180.
(3) Law Rep. 2 Ch. 427.
(4) Ibid. 4 Eq. 238.

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Dec. 20.

SCULTHORPE *v.* TIPPER.

[1870 S. 30.]

Liability of Trustees—Shares in an Unlimited Company—Costs.

13 Ch D. 657-8
664-5.

A testator gave all the residue of his estate and effects, whether real or personal, to four trustees upon trust to sell his freehold estate at *L.*, and such part of his personal estate, immediately after his decease, or so soon thereafter as the trustees might see fit to do so, and either by auction or private contract as to his trustees should seem proper. The personal estate comprised shares in an unlimited banking company, which was of high standing and repute at the testator's death. The trustees retained these shares for two years and a quarter, when the bank suspended payment, and the company was wound up. Three months after the testator's death the trustees also accepted new shares in the bank, which were allotted to the holders of old shares, and the entire loss to the estate amounted to £1910:—

Held, upon a bill filed to administer the estate by the next friend of infants who were entitled to one-third of the property, that the trustees, although they had acted in perfect good faith and as they considered best for the interests of the *cestuis que trust*, were bound to have sold the bank shares within a reasonable time, which was one year from the testator's death; and were, therefore, liable to make good the loss sustained on both sets of shares:

Held, also, that one of the trustees, who did not attain twenty-one till seventeen months after the testator's death, was equally liable with his co-trustees.

So much of the costs of the administration suit as were caused by the default of the trustees were ordered to be paid by them.

JOHN PALMER, by his will, dated in August, 1862, appointed *John Tipper*, *J. Smith*, and *A. Cooper*, his executors and trustees; and he devised and bequeathed to his trustees his freehold estate at *Lapworth*, his five leasehold houses in *Aston Street*, his shares in public companies, ready money and securities for money, and all the residue of his estate and effects whatsoever and wheresoever, whether real or personal, to his said trustees, their heirs, executors, administrators, and assigns, according to the nature of the same, upon the following trusts: "Upon trust to collect and get in the several debts and sums of money due and owing to my estate, including debts due to me on mortgage, if they shall think proper to require payment thereof, otherwise to permit and suffer the said mortgage debts, any or either of them, to remain in or upon their present securities, and to sell and dispose of my freehold

estate at *Lapworth*, and such part of my personal estate (other than and except my said leasehold premises and the furniture and effects hereinbefore given to my wife), immediately after my decease, or so soon thereafter as my said trustees may see fit so to do, and either by public auction or private contract, or partly by public auction and partly by private contract, with liberty to buy in and afterwards to sell or offer the same again for sale without being answerable for any loss or deficiency on such re-sale or attempted sale, as to my said trustees, or the survivors or survivor of them, his executors or administrators, shall seem proper, for such price or prices, sum or sums of money, as my said trustees may think reasonably sufficient for the same, and out of the moneys to arise therefrom pay and satisfy the expenses of or incidental to such sale or sales, and to stand possessed of the residue of the moneys to arise from such sale or sales, and all the said trust moneys, from and after payment of my just debts, funeral and testamentary expenses, and the legacies bequeathed to my said trustees, upon trust to lay out and invest the same in their names upon mortgage of freehold or leasehold land or buildings, of sufficient value, in *England* or *Wales*, or in some one of the public stocks or funds of *Great Britain*, or on mortgage or bond of any public dividend-paying company duly authorized to borrow the same, and from time to time call in the said moneys and again invest the same in or upon any other security or securities of a like nature, as occasion may require, as my said trustees may think desirable; and to stand possessed of the same trust moneys and the stocks funds or other securities in or upon which the same shall be placed out, or invested as aforesaid, upon the trusts following;" upon trust (after setting apart a sufficient sum to provide an annuity for his wife) to pay one-third part of the said trust funds to his son, *John S. Palmer*, when he should attain the age of twenty-one; and to stand possessed of the remaining two-thirds thereof upon trust to pay and divide the interest and proceeds thereof in equal shares between his two daughters, *Hannah* and *Clara*, during their lives for their separate use, and after their decease in trust for the children of his said daughters in manner therein mentioned.

By a codicil to his will, dated in December, 1863, the testator revoked the appointment of *J. Smith* and *A. Cooper* as executors

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and trustees of his will, and appointed the Defendants, *H. Hurley*, *Charles Smith*, and *Edward Reeves*, executors and trustees thereof jointly with *J. Tipper*.

The testator died in April, 1864. His daughter *Hannah Palmer* married *John Sculthorpe* in June, 1866, and there were two children of the marriage.

The testator, at his death, was possessed of thirty-seven shares in the *Birmingham Banking Company*, an unlimited company, which was then considered a secure and profitable investment. Three months after the testator's death the company issued new shares, and nine of such new shares were offered to the trustees in respect of the thirty-seven old shares held by the testator, and these nine shares were accepted and taken up by the trustees, who paid the amount required for such shares out of the trust funds.

On the 13th of July, 1866, being two years and a quarter after the death of the testator, the *Birmingham Banking Company* suspended payment, and shortly afterwards an order was made for winding up the company.

During the process of winding-up calls had been made upon the shareholders, and these calls had been paid by the Defendants upon the shares held by them out of the estate of the testator, and the whole liability caused thereby amounted together to the sum of £1910 12*s.* 9*d.*

The bill was filed on behalf of the infant children of *Hannah Sculthorpe* by *John Sculthorpe*, their father, as next friend, praying that the Defendants, the trustees, might be declared liable to make good to the estate of the testator all loss which had already accrued, or might thereafter accrue, by reason of the default of the Defendants in not selling and disposing of such shares in the *Birmingham Banking Company* as belonged to the testator's estate, and also by reason of the investment of any portion of the testator's estate in the purchase of new shares in the company; and that the Defendants might be ordered to pay the costs of the suit.

The Defendants *J. Tipper*, *H. Hurley*, and *C. Smith*, by their answer stated that at the period of the testator's death, and down to the very time when the *Birmingham Banking Company* suspended payment, the company was doing a large business, and its shares were considered to be a perfectly safe and very advantageous

investment; and the testator in his lifetime had a very high opinion of the shares, and told the Defendant *J. Tipper* that they were his best investments, and paid him better than any other property he had. Under these circumstances, and acting in perfect good faith, and with a sincere desire to benefit the testator's estate, and considering that they had, under the will, a full discretion as to the time of sale, they, with the knowledge and concurrence of the testator's widow, refrained from selling the said shares, and in that sense allowed the testator's moneys invested therein to remain so invested. They further said that in the month of July, 1864, nine new shares were offered to these Defendants, as the executors of the testator in respect of the thirty-seven old shares held by him. The new shares were eagerly sought after and taken up, and, acting in perfect good faith, and believing it to be most advantageous to the testator's estate, and with the knowledge of the testator's widow, they accepted the nine new shares, and out of the moneys forming part of the testator's residuary personal estate paid the sum of £270 for and in respect thereof.

The Defendant *Edward Reeves*, the fourth trustee and executor, who was under age at the death of the testator, by his answer stated that he did not attain his age of twenty-one until the 25th of September, 1865, and had never proved the will, and had no control over the shares in question, except that he had often asked the other trustees if it would not be better to sell them. He had never acted in the trusts of the will until he attained twenty-one, being only nine months before the failure of the banking company, and then only in signing certain mortgage securities and receipts for money, in conjunction with the other Defendants.

Mr. *Cole*, Q.C., and Mr. *Ince*, for the Plaintiff:—

By the will of *John Palmer* these shares in the *Birmingham Banking Company* were given, with other property, to the trustees upon trust to sell immediately after the death of the testator, or so soon thereafter as the trustees should see fit to do so. This is an absolute trust for sale within a reasonable time, and the trustees were not justified in allowing the money to remain upon so insecure an investment as that of an unlimited company, when, if it failed, the whole property of the testator might be entirely lost.

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The principle is clearly laid down in the case of *Grayburn* v. *Clarkson* (1). The Lord Chancellor there said the *primâ facie* rule is, that executors must convert within twelve months, and if they do not they must shew some reasons for the delay. In that case there was no realization within thirteen months after the death of the testator; there was no ground for imputing bad faith or gross negligence. It was simply an omission to fulfil the duty devolving upon the executors for one month beyond the required time, and the estate of the defaulting trustee was declared liable for the loss. It is true that in *Buxton* v. *Buxton* (2) the executor was held not liable for loss sustained by not realizing certain Mexican bonds, but that was not the case of an unlimited company. The price of the bonds would only have been rather less than they would have sold for if the conversion had taken place at an earlier period, and the executor in that case had acted throughout with diligence and good faith. There is no excuse here for the executors retaining the bank shares, except that they were producing a high rate of interest, which was a special reason why they should have been sold, as in consequence thereof the risk was the greater.

Mr. *Glasse*, Q.C., and Mr. *W. Pearson*, for the first three executors:—

The terms of this will constitute no direction to sell immediately, or to sell any part of the personal estate except such part as the trustees might think fit. It is evident that the testator intended to take the case out of the general rule, and to give power to his trustees to retain the shares so long as they considered it desirable. The rule is stated clearly in *Lewin* on Trusts (3) in these words: "If it appears from the terms of the will that the testator intended to give his trustees a discretion as to the time of conversion, which discretion has been fairly exercised, the case must be governed by the testator's intention and not by the general rule;" and he cites several cases in support of this principle: *Mackie* v. *Mackie* (4), *Wrey* v. *Smith* (5), *Sparling* v. *Parker* (6), and others. That the testator intended to give the trustees unusual discretion cannot be doubted, since there

(1) Law Rep. 3 Ch. 605.
(2) 1 My. & Cr. 80.
(3) 4th Ed. p. 249.
(4) 5 Hare, 70.
(5) 14 Sim. 202.
(6) 9 Beav. 524.

is evidence to shew that he had a high opinion of the bank shares, and believed them to be the best investment he had. Moreover, in the first part of the clause, he uses words giving ample discretion. The trustees are to collect and get in the debts due to the estate, including debts on mortgage if they should think proper to require payment thereof, otherwise to permit such mortgage debts to remain upon their present securities. He must have intended to carry on the same extensive discretion to the rest of the property, and the trustees might well consider, as they did, that they had full power to allow the shares to remain upon the securities selected by the testator himself. The testator has in fact shewn what sort of investment he thought most beneficial for his property. Then, as to the conduct of the trustees, there is no question of their good faith. They acted to the best of their judgment, and for the best interests of their *cestuis que trust.* There is evidence to shew that all the parties, including the widow of the testator and his daughter (the mother of the infant Plaintiffs), approved of the course taken by the trustees.

As to the nine new shares which were accepted by the trustees, they were a mere bonus or accretion to the old shares. They were allotted in certain proportions to the holders of old shares as a special advantage to them, and they came out at a premium, so that the trustees would have thrown away a bonus granted to them if they had refused to take up the new shares.

If the Court should, however, feel that the trustees have acted wrong technically, they will, at any rate, be entitled to their costs; this has always been the rule where trustees are proved to have acted *bonâ fide,* and without any intention to commit a breach of trust.

It is shewn here that only one of the three parties interested in the property, has come forward to complain of the conduct of the trustees, and that he has done so contrary to the wishes of the other two parties. There is evidence of an ill feeling existing on behalf of the next friend, sufficient to account for this suit; and it was held in *Clayton* v. *Clarke* (1) that the Court will take into consideration the motives which actuated the next friend in instituting a suit, and if it appeared that he had other motives than the benefit of the infants the Court would deprive him of his costs.

(1) 9 W. R. 718.

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The Defendants have stated that, in consequence of their inability to meet these demands, they will be driven into bankruptcy, consequently the infants will derive no benefit from the present proceedings.

Mr. *Cotton*, Q.C., and Mr. *Humphry*, for *Edward Reeves*, the fourth executor, who was under age at the death of the testator, followed the same line of argument, and cited *Paddon* v. *Richardson* (1). They also submitted that as Mr. *Reeves* did not attain twenty-one till nine months before the failure of the bank he could not be held responsible for what had been done by the other executors. It was not likely that so young a man would be able to induce his three co-executors to act upon his advice, and he could not have compelled them to do so.

Mr. *Herbert Smith*, for the widow of the testator.

Mr. *Cole*, in reply :—

The arguments of the Defendants place them in this difficulty, that the trustees were either bound to sell or else that they had an unlimited power to retain the property, and in that case they might have refused altogether to convert the shares. It is evident that the testator never could have intended by the words "immediately or so soon as they shall think fit" to give his trustees power to retain the shares for any number of years they pleased; consequently they were bound to sell within a reasonable time, and that time is fixed by the authorities to be within twelve months.

SIR R. MALINS, V.C. :—

This case raises a question of great interest. The *Birmingham Banking Company*, at the time the testator took the shares which were held by him at his death, was evidently considered to be well established and thoroughly safe. It does not appear when it was founded, but it must have existed prior to the year 1844, as it is mentioned in the *Bank Act* of that year. There is evidence to shew that the testator himself had a high opinion of the investment, and considered it the best he had. After the testator's death the trustees continued to hold the shares for two years and

(1) 7 D. M. & G. 563.

a quarter, when the failure of the bank took place. The trustees also accepted nine new shares, which were offered them in respect of the original shares held by the testator. Upon the new shares there has been paid out of the estate the sum of £270, and the total loss arising out of the failure is computed to amount to £1910 12*s.* 9*d.* There has, consequently, been a total loss of all the shares; and this being an unlimited company it would be impossible to indicate what the loss might have been. The bill is filed by Mr. *Sculthorpe,* who married one of the daughters of the testator, as next friend of his infant children, calling upon the trustees to make good the loss caused to the estate of the testator.

On the part of the Plaintiffs the case is that the will contained a direction to the trustees to convert all the estate of the testator, and that, considering these were shares to which an unlimited liability attached, it was their duty within the period of twelve months to have sold the shares and got rid of their liability. On the other hand, it is said by the trustees that this was an honest exercise of the discretion given them by the terms of the will; that the testator himself would have retained the shares if he had been alive; and that being an honest exercise of their discretion, from which they could derive no benefit whatever, they are not liable for the loss which has occurred. I confess that the case is so unreasonable on the part of the Plaintiff, and is one of so much hardship upon the trustees, acting, as I am convinced they did, for the best interests of the parties, two of whom are not here to complain of their conduct, that it did appear to me at first that I could come to the conclusion that the trustees had so acted as not to have incurred the liability with which they are charged; but upon the most careful consideration I can give to the case, I feel that I am bound to come to the conclusion that although a discretion was vested in the trustees, they were bound to exercise that discretion within a reasonable time, and that that time, as a rule of convenience, should have been within one year.

The argument on the part of the Defendants is, that they had an unlimited power to sell or retain the shares as they should think fit; but the language of the will is that they are to sell and dispose of the freehold estate at *Lapworth*, and such part of the personal estate (other than and except the leasehold premises and

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the furniture and effects given to his wife), immediately after his decease, or so soon thereafter as the trustees might see fit so to do, and either by public auction or private contract as to the trustees should seem proper. That is an absolute direction to sell immediately or so soon as the trustees shall think fit, and the proceeds of the sale are to be held upon a special trust in favour of the testator's children.

It was, therefore, in my opinion, the duty of the trustees to sell within a reasonable time, and I am unable to fix any other time than that which is settled by the case of *Grayburn* v. *Clarkson* (1), which is within one year after the testator's death. It is true the words were different in that case; there the direction was to "convert the estate with all convenient speed." Here the direction is to sell immediately or so soon as the trustees shall think fit so to do. The Lords Justices decided that the executors were liable for all loss occasioned to the testator's estate by the omission to sell the shares within twelve months.

No Judge can decide a case such as this against trustees without regret; but I feel that unless I can come to the conclusion that the will gives power to retain the shares for an indefinite period, I must conclude that it meant within a reasonable time, which is one year from the death of the testator.

The other cases which have been cited do not in any way militate against this principle. In *Buxton* v. *Buxton* (2), where there never was any intention on the part of the trustees to retain the bonds, and where they did actually sell within a year and seven months, the decision of the Court was that they were entitled to a reasonable time for disposing of the property; but there is this great distinction between the cases, that these are shares of an unlimited company, whereas in that case no further liability could arise than the loss of the amount of the shares, and the trustees did in fact sell them at a somewhat lower price than they would have sold for if disposed of during the year. In a limited company you may sell at a greater or less loss to the estate, but without incurring any further liability; but in an unlimited company it may be the entire sweeping away of the whole of the testator's property. Where the property is invested in the shares of an un-

(1) Law Rep. 3 Ch. 605. (2) 1 My. & Cr. 80.

limited company, unless a retention is actually ordered by the will, it is the duty of trustees to get rid of it as soon as possible, so as to exonerate the estate of the testator from liability.

I therefore come to the conclusion that the case of the Plaintiffs is made out against the trustees as to the original shares.

Then with regard to the new shares which were offered to the trustees and accepted by them, the case is too clear for argument. The trustees were bound to ascertain what they were to do with the money which came to their hands under the terms of the will, and as there is no power given them to invest the property in the shares of any company, they were not justified in purchasing these new shares. I should, therefore, have been bound to decide against them on this question; and there is no excuse in the statement set forth by them, that the shares came out at a premium, which was beneficial for the parties. It was their duty to attend to the terms of the trust, and not to be guided by the wishes of the parties themselves.

It is said on behalf of Mr. *Reeves*, the fourth trustee, that his position is different from that of the other trustees, because he was under age at the time he was appointed a trustee, and that more than a year had elapsed after the death of the testator when he came of age. I cannot, however, see any ground for drawing a distinction in his case, and I must decide that he has put himself in the same position as the other trustees.

I feel great reluctance in coming to the conclusion I have done, and the more so because I am told that the circumstances of the trustees are such that they will be compelled to become bankrupts. I should be sorry if this should be the effect of my decision, because I think they acted for the best according to their judgment, and the filing of this bill was certainly not an act of good feeling on the part of the father of these children. It is evident, indeed, that there has been a great deal of personal feeling mixed up with the matter, and the Plaintiff must see that it could never redound to the benefit of his children to force these gentlemen into bankruptcy, the effect of which will be that all prospect of recovering their property will be lost.

Under these circumstances, although I am bound to make a decree against the Defendants, I shall be ready to listen to any

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proposal for a compromise of the suit which may be brought before me in Chambers, taking into consideration what may be for the benefit of the infants.

As to the costs, though I deprecate the institution of the suit, I do not see how I can make an exception in this case to the general rule; but as this is a suit for the administration of the testator's estate, the Defendants will only have to pay so much of the costs as have been occasioned by the contest in respect of these shares. They will be entitled to their costs of the administration suit.

Solicitors for the Plaintiff: Messrs. *Doyle & Edwards.*
Solicitor for three of the Executors: Mr. *J. Letts.*
Solicitors for the Widow: Messrs. *Rickards & Walker.*
Solicitors for the Fourth Executor: Messrs. *Whittington & Son.*

WARD *v.* WOLVERHAMPTON WATERWORKS COMPANY.

V.-C. B.
1871
Nov. 8.

[1871 W. 169.]

Option of Purchase—When exerciseable.

An agreement (sanctioned by Act of Parliament) was entered into between two water companies, by which it was agreed that company *A.* should take over the works, provide for a mortgage debt, and pay interest upon the shares of company *B.* This agreement was sanctioned by Act of Parliament, and the transaction was carried into effect by an indenture of January, 1857, which provided that if company *A.* (or their intended assignees, the Corporation or Local Board of Health), being desirous of becoming the absolute and unrestricted owners of the works of company *B.*, subject only to the mortgage debt, should, "on or before any 25th of December, after having given to company *B.* six months' previous notice of their desire to avail themselves of the option thereby given, pay unto company *B.*" £46,246, the amount of their share capital, the party so paying should become absolutely entitled to the works.

In June, 1870, the corporation, who had acquired the interest of company *A.*, gave notice to company *B.* of their intention to pay the £46,246, on the 25th of December following, but they were unable, from want of funds, to carry out the purchase. In June, 1871, they again gave notice that they would pay the money on the 25th of December, 1871:—

Held, that the corporation, by giving the first notice and failing to act upon it, had not lost the right given to them by the deed of January, 1857, of purchasing, after six months' notice, on or before any 25th day of December.

DEMURRER.

From the statements of the bill, which was filed by the Plaintiff on behalf of himself and all other the shareholders in the *Wolverhampton Waterworks Company*, except the Defendants thereto, it appeared that the *Wolverhampton Waterworks Company* (the old company) were incorporated by Act of Parliament in 1845, with a capital of £26,000, divided into 2600 shares of £10 each; it being provided that, after half the original capital should have been paid up, it should be lawful for the company to borrow on mortgage to the extent of £8000. By an Act passed in 1850 further powers were given to the old company for extending their works and raising additional capital.

By the *Wolverhampton New Waterworks Act*, 1855, the new company were incorporated, with a capital of £100,000; and it

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was thereby enacted that it should be lawful for the new company, and they should be bound and obliged, if thereunto required by the Corporation of *Wolverhampton*, to sell and transfer to the corporation the whole of their undertaking, and the lands, waterworks, and property, on such terms and conditions as should be mutually agreed on, and in case of any difference, should be settled by arbitration under the *Lands Clauses Act;* and thereupon the property of the new company should vest in the corporation, and all contracts made with the new company should thenceforth be valid in favour of or against the corporation.

On the 14th of February, 1856, an agreement was executed between the old company and the new company, by which, after reciting that £44,980 was the amount on the 3rd of April, 1855, of the share capital of the old company, and that £17,300 was the amount of the borrowed capital or mortgage debt of the old company, it was agreed that in the event of the agreement being confirmed by Parliament, the old company should make, and the new company accept, a grant in perpetuity of the works of the old company, under a rent which should be equal to interest at 5 per cent. (or in the event therein mentioned, at 4½ per cent.) on the £44,980, and a further sum accrued in addition thereto since the 3rd of April, 1855, up to the date of the agreement, making in all £46,246. In case the new company should sell the works to the Corporation or Local Board of Health for *Wolverhampton*, the rent should be a rent equal to interest at 5 per cent. on the aforesaid share capital of the old company after such sale; and the new company was to pay all interest upon the mortgage debt of the old company, and to indemnify the old company against payment of the capital of the mortgage debt. It was also agreed that the grant should contain a provision enabling the new company, or in the event of a sale to the Corporation or Local Board of Health, then the corporation or local board, or their assigns, on or before the end of any year, by the payment by them to the old company of a sum equal to the share capital of the old company, to entitle the new company, or the parties making such payment as aforesaid, to the works and premises comprised in such grant, subject to the mortgage debt of £17,300.

By the *Wolverhampton Waterworks Transfer Act*, 1856, this

agreement was confirmed, and the companies were authorized to execute an indenture for the purpose of more effectually carrying out the transfer.

Accordingly, by an indenture dated the 1st of January, 1857, between the old company and the new company, the old company granted all their works and generally the whole undertaking of the old company unto the new company and their successors in perpetuity upon the terms stated in the agreement of the 14th of February, 1856. It was also thereby declared and agreed that if the new company, or in the event of a sale to the said Corporation or the Local Board of Health of *Wolverhampton* as aforesaid, then, if the said Corporation or Local Board of Health, "being desirous of becoming the absolute and unrestricted owners of the works and premises thereinbefore expressed to be thereby granted, subject only to the said debenture debt of £17,300 and interest, should, on or before any 25th of December, after having given to the old company six calendar months' previous notice of their desire to avail themselves of the option thereby given, pay unto the old company the sum of £46,246, the new company, or the party making such payment, should thereupon become entitled to the said works and premises, subject to the said debenture debt of £17,300 and interest, but freed and discharged as from the day of such payment, if the same should be made on any 25th of December, or if on any other day as from the 25th of December next succeeding such day of payment, from the rents thereby reserved, and from all other the covenants on the part of the new company, and other the stipulations and provisions in restriction of their absolute ownership in the now stating indenture contained, save and except the covenants and provisions for the indemnity of the old company against the said debenture debt of £17,300; and that, on payment in manner aforesaid of such sum as aforesaid, the old company should, at the expense of the new company, do all such acts and things as might be necessary for carrying into complete effect that provision."

By indenture of the 24th of June, 1869, the new company transferred their undertaking to the Corporation of *Wolverhampton*, in pursuance of the *Wolverhampton Waterworks Transfer Act*, 1867.

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On the 18th of June, 1870, the corporation, in pursuance of their parliamentary powers, gave notice to the old company that, on the 25th of December, 1870, they would avail themselves of the option given to them by the indenture of the 1st of January, 1857, and would pay the sum of £46,246, being the amount of the old company's share capital. The corporation were unable, however, from want of funds, to act upon the notice given by them in June, 1870, but applied for an extension of the time for payment off of the amount. The company declined to extend the time for payment of the share capital, stating that they considered any right of purchase the corporation might have had was at an end. On the 15th of June, 1871, the corporation served a second notice, that, being desirous of becoming the absolute and unrestricted owners of the works granted by the old company to the new company, subject only to the old company's debenture debt of £17,300 and interest, they, the corporation, would avail themselves of the option given by the indenture of the 1st of January, 1857, and would pay to the old company the sum of £46,246, being the amount of their share capital.

The bill stated that since the receipt of this last notice, and in pursuance thereof, the corporation had been making the necessary arrangements for the absolute purchase of the waterworks, and for the payment off of the share capital of the old company, on the 25th of December, 1871; and that, if such purchase were completed, it would be to the prejudice of the Plaintiff and the other shareholders in the old company. The Plaintiff submitted that the right of purchase given to the corporation by the indenture of the 1st of January, 1857, was determined by their default in payment of the £46,246 on the 25th of December, 1870, pursuant to their notice of June, 1870; and that any sale to the corporation by Defendants in pursuance of the notice of the 15th of June, 1871, would be invalid.

Under these circumstances, the bill prayed a declaration that the right of purchase given to the corporation by the indenture of the 1st of January, 1857, of the works and premises thereby granted was now determined, and that the notice of the 15th of June, 1871, was of no effect. The bill also prayed an injunction to restrain Defendants, the old company, from selling or trans-

ferring to the corporation the works and premises comprised in the indenture of the 1st of January, 1857.

To this bill the Defendants demurred.

Mr. *Kay*, Q.C., and Mr. *Jolliffe*, in support of the demurrer:—

The corporation, by failing to pay off the share capital at the time specified in their first notice, have not for ever lost their right. No doubt where there is a provision that the vendor may re-purchase, it has been held that the time limited for that purpose ought to be precisely observed: *Barrell* v. *Sabine* (1); and that the party claiming the right to re-purchase is bound to give a regular notice, and also bound to pay according to that notice: *Joy* v. *Birch* (2); *Lord Ranelagh* v. *Melton* (3). But those cases are distinguished, as this is not one of re-purchase between vendor and purchaser, so as to render time of the essence of the contract. It is rather like the right of redemption in a mortgagor, which may be exercised at any time, or a power of appointment, which is not necessarily destroyed by a previous ineffectual and illegal attempt to exercise it: *Topham* v. *Duke of Portland* (4). Moreover, the terms of the agreement, "on or before any 25th of December, after having given to the old company six calendar months' previous notice," &c., shew conclusively that time was not made of the essence of the contract. The payment may be made at any time during any year, and the six months' notice is only introduced for the convenience of the old company, as in the case of a mortgagee. It cannot, therefore, be held that by failing to pay at the expiration of the first six months' notice, the corporation have lost the benefit of the condition entirely: *Pegg* v. *Wisden* (5).

Mr. *Fry*, Q.C., and Mr. *F. T. Procter*, in support of the bill:—

We agree that this provision as to six months' notice was introduced for the convenience of the old company shareholders; but no possible advantage can result to them if this notice is to be kept hanging over their heads *de anno in annum*. The clause in question is not a power of redemption, which only occurs when the

(1) 1 Vern. 268.
(2) 4 Cl. & F. 57.
(3) 2 Dr. & Sm. 278.
(4) Law Rep. 5 Ch. 40.
(5) 16 Beav. 239.

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relation of lender and borrower exists, but an option to re-purchase, limited to be void upon the non-performance of a certain condition; the test of the question, whether the contract was in its nature a mortgage under the form of a sale or a *bonâ fide* purchase, subject to a contract for re-purchase, being the reciprocity and mutuality of the remedies: *Fisher* on Mortgages (1). In conditions of re-purchase or pre-emption, time has always been held to be of the essence, and as the terms of the notice of June, 1870, have not been complied with, the condition is gone: *Davis* v. *Thomas* (2); *Brooke* v. *Garrod* (3).

Mr. *Kay*, in reply.

SIR JAMES BACON, V.C.:—

The question which I have to determine is one of the narrowest kind, as it depends entirely upon the construction of the deed of 1857. There is no doubt that in the case of a sale of property, where a right of re-purchase is reserved, terms may be imposed upon the exercise of that right, the non-performance of which will deprive the person entitled to it of any benefit from such exercise. *Brooke* v. *Garrod*, which was referred to, was an instance of the like kind, where a right of pre-emption was lost by the non-performance of terms imposed by a testator's will. But that principle does not affect the present case. The transaction, which is stated clearly in the bill, was of the following nature: There was an old company consisting of shareholders, which had incurred a mortgage debt of £17,300, and was possessed of works and other property. An agreement was entered into for the transfer of this property to the new company upon certain terms. The new company contracted to take the property and to pay the mortgage debt, and also to pay interest upon the shares of the old company at the rate of 5 per cent., with a proviso for the reduction in certain events of the rate of interest to $4\frac{1}{2}$ per cent. This agreement was quite consistent with the circumstances of the case. The shareholders of the old company were to cease to have any connection with the works, and they were to be protected from all loss. The

(1) Pages 13, 14. (2) 1 Russ. & My. 506.
(3) 2 De G. & J. 62.

agreement was objected to by no shareholder, and they had no cause whatever of complaint. An Act of Parliament was passed to ratify the agreement, and the whole transaction was carried into effect by the deed of the 1st of January, 1857, which contains the following clause:—[His Honour referred to the clause giving the option to purchase, set out in the statement.]

How can I insert into that clause a proviso, that if six months notice be given and failure is made in payment at the expiration of the notice, the right of purchase is destroyed? I cannot make any such insertion. The deed of 1857 must be construed by the light of the agreement of 1856 and the Act of 1856, which are recited in it; and reading them together, the construction of the deed is clear. I should, however, be sorry to decide this question upon the effect of words, if I thought the words were inconsistent with the intention of the parties. But I cannot say that the words were inconsistent with the intention. I can see no hardship to the shareholders in the continued existence of this power of paying off the share capital. The same power exists of paying off those who hold stock in the public funds; but that power does not create any difficulty in the sale of the stock. The case made by the bill does not go beyond a vague allegation that the transaction will prejudice the Plaintiff; but I cannot see that anything will happen which was not contemplated in the agreement; and I am of opinion that the argument from inconvenience has no place in the present case. There was no ground for the institution of the suit, and the demurrer must be allowed with costs.

Solicitors: Messrs. *Sharp & Ullithorne;* Messrs. *Bower & Cotton.*

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PALMER *v.* FLOWER.

[1870 P. 89.]

Will—Legacy—Failure of Purpose of Legacy—Gift Valid—Special Case—Practice.

7 Ch. 727-9

Testator, after giving a life annuity, from and after the death or marriage of his sister-in-law, in trust for his nephew, her son, bequeathed the residue of his mixed real and personal estate specifically in favour of his nieces, their husbands, and children. He then declared that "for making a further provision for the maintenance of" his above-mentioned nephew, it should be lawful for his trustees, during the life of his sister-in-law upon her request in writing, to expend any sums not exceeding £6500 in the purchase of a commission for, or in obtaining the promotion of, his nephew in the army.

After the testator's death the nephew, being in the army, exchanged from one regiment into another, and in so doing paid £600 for the exchange, and £550 for horses and outfit; after which, in May, 1868, his mother signed and sent a formal request to the trustees, desiring that the whole of the £6500, with interest from the day of the date of the request, should be raised out of the residuary estate, and paid to her son.

From and after the 1st of November, 1871, purchase of commissions in the army was by royal warrant abolished:—

Held, that the nephew was entitled to the full sum of £6500, with interest at 4 per cent. from the date of the request, subject to the payment of legacy duty.

Since the filing of a special case affecting property to which certain infant Defendants were entitled, another child in the same interest had been born.

The Court, at the hearing, dispensed with the presence of the newly-born child.

SPECIAL CASE.

Charles James Palmer, who died on the 3rd of January, 1868, by his will, dated the 22nd of November, 1867, after appointing executors, bequeathed the residue of his mixed real and personal estate upon trust to pay the income to his sister-in-law, *Elizabeth Palmer* during her widowhood; and after the determination of such trust, upon trust in case his nephew, *William Henry France Palmer*, should be then living, to appropriate or purchase a sufficient sum of consols to procure an income of £104 per annum, to be paid to *W. H. F. Palmer* during his life, or until his bankruptcy, composition with his creditors, or alienation thereof; and the testator declared that if the last-mentioned trust should determine

in the lifetime of *W. H. F. Palmer*, the trustees should in their discretion pay the said income without anticipation for or towards the maintenance and support of *W. H. F. Palmer*. The testator declared that, subject to the discretionary trust aforesaid, the capital fund so to be appropriated should form part of his residuary estate.

The testator then disposed of his residuary estate specifically, as to one moiety, in favour of his niece *Frances Eliza Pitt*, her husband and children; as to the other moiety in favour of his niece *Augusta Mehetabel Cook*, her husband and children; and as to either or both moieties, in default of children and of appointment by will by either niece respectively or both the nieces, in trust for the children of his sister *Eliza Celia Clarkson* living at his death.

Testator then continued:—

"Provided always, and I declare, that for making a further provision for the advancement of my said nephew, *W. H. F. Palmer*, and notwithstanding the trusts and provisions in favour of my said sister-in-law, *Elizabeth Palmer*, and of my said nieces and their respective husbands and children, it shall be lawful for my said trustees or trustee, during the life of the said *Elizabeth Palmer*, upon her request in writing, and after her death, at the discretion of the trustees or trustee, from time to time to expend any sum or sums of money out of my residuary estate, so that the aggregate amount so expended do not exceed the sum of £6500, in the purchase of any commission or commissions for, or in obtaining the promotion of, the said *W. H. F. Palmer* in Her Majesty's army; and I declare and direct that every sum of money so expended shall, as to one-third part thereof, be taken from the half part of my residuary estate hereinbefore referred to or distinguished as "the first moiety," and as to the other two-third parts thereof be taken from the half part of my residuary estate hereinbefore referred to or distinguished as "the second moiety."

At the testator's death *W. H. F. Palmer* was a lieutenant in the 68th Regiment of Infantry. He afterwards exchanged into the 14th Hussars, and for this purpose, on the 15th of February, 1868, paid £600 for the exchange and £550 for horses and outfit.

On the 30th of May, 1868, Mrs. *Palmer* signed and sent to the

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trustees a written request that they would pay to her son *W. H. F. Palmer*, out of the testator's residuary estate, the whole of the £6500, with interest at £4 per cent. from the date of the request, or, at all events, the sum, free from legacy duty, of £630, paid by him in effecting the exchange, and also the sums "either already or to be hereafter expended" by him in purchasing horses and providing his outfit, with interest as aforesaid.

The trustees declined to make any payment without the sanction of the Court.

The case was filed in July, 1870, by *W. H. F. Palmer* and Mrs. *Palmer*, as Plaintiffs, against the executors and trustees, and the persons beneficially interested under the will; the Plaintiffs submitting that the Plaintiff *W. H. F. Palmer* was entitled to be paid out of the testator's residuary estate the whole of the £6500 and interest at 4 per cent. from the date of the request; or, if not, that he was entitled to be paid out of the residuary estate, free of legacy duty, £1150 (being the £600 and £550) with interest at 4 per cent.

The case alleged that the Defendants, other than the trustees, submitted whether the sum of £1150 and interest should be paid to the Plaintiff *W. H. F. Palmer*, but insisted that he was not as yet absolutely entitled to any other part of the £6500 and interest.

The questions were, 1, whether the Plaintiff *W. H. F. Palmer* was entitled to the whole of the £6500; or 2, to the £600; or 3, to the £550; 4, if to any sum, whether also to interest; 5, whether subject to legacy duty; and 6, as to the costs of the case.

After the filing of the case, by royal warrant dated the 20th of July, 1871, followed by the *Regulation of the Forces Act*, 1871 (34 & 35 Vict. c. 86), passed on the 17th of August, 1871, purchase in the army was abolished from and after the 1st of November, 1871.

Since the case was set down a child of one of the nieces had been born.

Mr. *Kay*, Q.C., and Mr. *Kingdon*, for the Plaintiff:—

Although the purpose of the legacy has failed, in consequence

of the abolition by royal warrant of the system of purchase in the army, the gift is nevertheless good to the full extent of the £6500 and interest from the date of the request.

"Where a legacy is given to a person to answer a particular purpose, to which it becomes impossible to appropriate it, but from no fault in the legatee, he will be entitled to the money; as in instances of a sum of money being left for the benefit of an infant as an apprentice fee, and he is never placed in the situation or character of an apprentice; or where a legacy is given to a person to assist him in defraying the expenses necessary to procure priest's orders, and he becomes a lunatic—in each case the legacy will vest at the testator's death, and upon this principle: it is considered that the property was intended for the legatee at all events, and that the mode directed for its application was merely a secondary consideration, and independent of the gift": *Roper* on Legacies (1), referring to *Barton* v. *Cooke* (2), and two other cases. This passage is cited with approval by Lord *Romilly*, M.R., in *Cowper* v. *Mantell* (3).

In *Leche* v. *Lord Kilmorey* (4) the legacy was left for the purpose (as here) of purchasing promotion in the army for the legatee, and he was held entitled, though compelled from illness to leave the army.

In *Robinson* v. *Cleator* (5), where there was a gift of the income of a fund upon trust to apply the income to the maintenance of a legatee until twenty-one; and afterwards a direction to pay the whole dividends to him for life; and the trustees were empowered, before he should attain twenty-six, to raise a sum not exceeding £600 "towards or in order to" his preferment or advancement in life; upon a claim by the legatee, on attaining twenty-one, to the whole fund, Lord *Thurlow* directed an inquiry as to the circumstances and situation of the claimant.

In this instance the discretion of the trustees was not to be exercised during Mrs. *Palmer's* life, so that the case is far within *Cope* v. *Wilmot* (6), commented on by the Lord Chancellor, when Vice-Chancellor *Wood*, in *In re Sanderson's Trusts* (7).

(1) 4th Ed. page 646.
(2) 5 Ves. 461.
(3) 22 Beav. 231, 233.
(4) T. & R. 207.
(5) 15 Ves. 526–7.
(6) 1 Coll. 396, n.
(7) 3 K. & J. 497, 505.

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[As to the practice in the event of a child having been born since the setting down of the case they cited, *In re Brown* (1) and *Morgan's* Chancery Acts and Orders (2).]

Mr. *Willcock*, Q.C., and Mr. *Dickins*, for the trustees.

Mr. *S. H. Boult*, for the residuary legatees:—

The rule laid down in *Roper* is an exception to a more general and leading rule—that, the purpose of a gift failing, the gift must fail likewise. The ground for the exception, which is that a legatee is not to be deprived, by an accident beyond his control, or, by no fault of his, of a provision made for his benefit, does not apply here, where a separate provision is made by the will for the Plaintiff after Mrs. *Palmer's* death. The question is, whether it is consistent with the testator's intention that his nieces and their families should be deprived of this sum for the benefit of a nephew, who cannot now use this money for the purpose for which it was expressly given to him by the testator.

At least the Court will not declare him entitled to more than his actual outlay, incurred before purchase in the army was abolished.

SIR JAMES BACON, V.C.:—

I think the questions in this case must be answered in favour of the Plaintiff, Mr. *Palmer*.

The sole judge constituted by the testator as to the propriety of raising this sum is the co-Plaintiff, Mrs. *Palmer;* and she, by a letter, has in the most formal and direct manner expressed her wish to the trustees that the whole of this sum shall be raised out of the residuary estate, and paid.

It is, no doubt, true, as has been observed, that an application of the sum to the purpose specified in the will is no longer possible; but this circumstance does not result from any act or default of the legatee.

The testator has explained his intention to be to make a further "provision for the advancement of" his nephew; and that intention is not to be defeated on the ground that the advancement can

(1) 29 Beav. 401. (2) 4th Ed. pp. 118 (*b*), 210 (*d*).

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no longer be made in the way proposed. It is quite possible that the legatee may obtain promotion in the army by other means, without any direct pecuniary outlay for that purpose.

Mr. *Kay* said that he could not contend against the liability to pay legacy duty.

A declaration was made to the effect that the Plaintiff *W. H. F. Palmer* was absolutely entitled to the £6500, subject to the payment of legacy duty, with interest at 4 per cent. from the 30th of May, 1868; the costs of all parties as between solicitor and client to come out of the residue; the Court dispensing with the presence of the newly-born child.

Solicitors for the Plaintiffs, and some of the Defendants: Messrs. *Palmer, Palmer, & Bull.*

Solicitor for the Trustees: Mr. *J. B. Marsden.*

In re EUROPEAN CENTRAL RAILWAY COMPANY.

V.-C. B. 1872 Jan. 11.

SYKES' CASE.

Company—Directors' Fees—Fraudulent Preference.

Under a power in the articles of association to receive payment of calls in advance, the directors of a company paid into the bank the amount remaining uncalled on their shares, and on the same day appropriated the money in payment of their fees, for which there were at the time, as they knew, no other available assets:—

Held, that the effect of the transaction was that there had been no *bonâ fide* payment in anticipation of calls, and that the directors, who were bound to exercise the powers given to them for the benefit of the company generally, and not with a view to their own private interests only, were not relieved from liability upon their shares.

ADJOURNED summons on behalf of the official liquidator of the *European Central Railway Company, Limited*, that a call to the amount of £22 per share might be made on the contributories of the company, whose names were set out in the second column of the first schedule (including Colonel *W. H. Sykes*, chairman of the board of directors of the company, in respect of twenty-five shares).

The company was formed in 1864, and by clause 35 of the articles

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of association it was provided that the board might, if they thought fit, "receive from any of the shareholders, willing to advance the same, all or any part of the amounts of their respective shares beyond the sums actually called for; and upon the moneys so paid in advance, or upon so much thereof as from time to time exceeds the amount of the calls then made upon and due in respect of the shares on account of which such advances are made, the board may pay or allow interest at such rate as the shareholders paying the sum in advance and the board agree upon."

The number of directors was fixed at five, and the first directors to be appointed by the subscribers to the memorandum of association, and any other directors to be appointed by the board, were to continue in office until the ordinary meeting to be held in 1866.

Sect. 89 provided: "The directors shall be entitled to set apart, and receive for their remuneration in each and every year, commencing from the 1st of January, 1866, the minimum sum of £3000. Such annual sum may be from time to time increased by the resolution of any general meeting. The money so allowed shall be divided amongst the directors as they may from time to time determine."

In September, 1865, the company was in a state of great pecuniary difficulty, being indebted on debenture bonds and bills to the extent of £176,000, while the assets in the bank were altogether insufficient to take up the acceptances of the company, or to meet the various claims, including the amount of the directors' fees and the salaries of the clerks. Writs had been issued and petitions for winding up the company were pending; but in these cases were not pressed on from—as was stated by the secretary—the Petitioners being satisfied that to go on would be simply to ruin the company, without the remotest chance of payment to the Petitioners, and from, in one case, the board giving their assurance that no preference should be made as between the creditors of the company if the Petition was withdrawn, bonds being given for the purpose of retiring the bills held by the Petitioners, whose costs were paid by the company. At this time the uncalled capital on 11,040 shares amounted to £287,040. At a board meeting held on the 29th of September, 1865, the directors determined to avail them-

selves of the power in the articles of association (clause 35), and pay their calls in advance in order to provide funds for payment of their fees; the nature of the arrangement being thus stated by the secretary in his evidence: "They said as they could not get their fees they might as well get rid of their liabilities as shareholders."

In pursuance of this arrangement, between the 2nd of October, 1865, and the 20th of August, 1866, Colonel *Sykes* paid, in anticipation of calls under clause. 35, sums amounting to £560 15*s.* 7*d.*

The sums thus paid in by Colonel *Sykes* and the other directors were drawn out on the same or the next day in payment of their fees as directors, the account at the bank being sometimes overdrawn, and if not overdrawn, reduced to a very small balance (below £50).

In August 1866, an arrangement was come to between the *Oriental Financial Corporation*, who were pressing for payment of a large sum claimed by them, and the company, under which, amongst other things, it was agreed that from that time the fees of the directors of the company should be withdrawn without prejudice to any question as to former fees alleged to have been irregularly retained.

In February, 1867, Colonel *Sykes* resigned his office of director. A balance of £125 was due to him for his fees, and in September, 1867, a cheque for this amount was prepared by the secretary, but never signed, as the company had not at that time sufficient funds at their bankers to meet the cheque.

In January, 1868, the company was ordered to be wound up.

The question upon the present summons was whether the transaction by which Colonel *Sykes* (whose case was taken as representative) and the other directors paid their calls in advance, and immediately appropriated the money in payment of their fees, was valid, so as to relieve them from all further liability on their shares.

Mr. *Kay*, Q.C., and Mr. *Bardswell*, for the official liquidator:—

This is a plain case of fraudulent, or, at all events, undue preference on the part of Colonel *Sykes* and his co-directors, who, knowing that the company was hopelessly insolvent, concocted this scheme for the purpose of securing payment of their fees and

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escaping all further liability. *Grissell's Case* (1) is a distinct authority that the amount of the call not paid cannot be set off against a debt due to the shareholders, and anything which, in the case of an individual trader, would be deemed, in the event of bankruptcy, an undue or fraudulent preference of his creditors, will be so deemed in the case of the winding-up of a company, and be invalid accordingly: *Companies Act*, 1862, s. 164.

Mr. *Eddis*, Q.C., and Mr. *Hughes*, for Colonel *Sykes*:—

This is an attempt to make the directors pay their calls twice over. At the time of the transaction, which was two years before the date of the winding-up order, the company was a going concern, and, having regard to the large amount remaining uncalled on the share capital, could not be considered as insolvent. Being a going concern the directors had the same right to payment as any other servants of the company. It is not pretended that the fees were not properly earned, and by clause 89 of the articles of association they are authorized to set apart and receive out of the funds of the company a minimum sum of £3000 per annum. By clause 35 they were entitled to accept (and make) payment of calls in advance, and upon the combined effect of these two clauses the transaction is perfectly valid and cannot now be impeached by the official liquidator. So far from anything fraudulent, their conduct has been perfectly disinterested, as, instead of adding to the embarrassments of the company by claiming their fees or making a call on the other shareholders, as they might have done for that purpose, they have made a call upon themselves, so as to reimburse the company the amount drawn out in respect of fees.

Mr. *Kay*, in reply.

SIR JAMES BACON, V.C.:—

The question on this summons must really be decided upon the terms of the articles of association, with this principle to guide me in the consideration of them, that it is the plain duty of the directors, who are trustees for the company, to deal in all matters of business with which the company is concerned for the benefit

(1) Law Rep. 1 Ch. 528.

of the company, and not with regard to their own particular interests. Now clause 89 provides for the remuneration of the directors, and it entitles them to set apart and receive for their remuneration the minimum sum of £3000, to be divided as they may think fit. That does not contemplate any periodical payments, but that "they may in each and every year, from January, 1866, set apart and receive," &c. It is proved that Mr. *Sykes* and the directors all knew that the company was at that time in pecuniary difficulties, and could not meet its engagements. Without laying any greater stress upon the evidence than the other circumstances justify, it appears that they came to an arrangement that, as they could not get their fees, they might as well get rid of their liability. There was no £3000 to be set apart or received. There was no balance at the bankers' out of which their fees could be provided for until they themselves raised the fund for the purpose. The manner in which the payments were made speaks for itself. When there was no balance, or little or none, at the bankers', they drew for an amount represented as their fees, so making up the sum by contributions which (at various times) were paid in and out—the next day or immediately afterwards. The transaction was plainly this: the directors saw that the company was insolvent. Of that I cannot entertain the slightest doubt, and I say so, bearing in full recollection all that was urged upon me as to the funds of the company, consisting of contributions from shareholders made from time to time; that the works were going on; that large works were completed, and that in respect of those works there was no call for present payment. But there were plenty of urgent calls—actions were brought, actions threatened, which were disposed of or staved off. Knowing all this, the directors, at a meeting of the committee for general purposes, made a suggestion that what was due to them, or might become due to them for fees, should be received out of moneys paid by them in anticipation of calls, and this suggestion seems to have been adopted at a meeting of directors held shortly afterwards. It is said that it is justified by clause 35 of the articles of association. Clause 35 says that "the board may, if they think fit, receive from any shareholder willing to advance the same, &c., &c." Now this means the exercise of a faithful and honest discretion on the part of

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the directors, exercised only for the benefit of the shareholders, and they may, under these conditions alone, exercise the power given by clause 35. Does what has been done come within that, or does it resemble it in the slightest possible degree? The company at that time was, as I think it is clearly proved, insolvent; utterly without means, as the bankers' balance shews beyond doubt, and there were no funds out of which the directors, under clause 89, could receive any money they thought fit. It is said that clause 89 gives them unlimited power, and no doubt, so far as the rest of the world is concerned, that may be; but if the power be limited, as I conceive it must be, by a due consideration of what was for the benefit of the company and their creditors (who are not entirely to be lost sight of), it was incumbent upon them to exercise their discretion fairly and honestly. I think this transaction cannot be reconciled with those principles which are, no doubt, universal. In my opinion this was a contrivance by which the directors seemed to pay, but did not in fact pay, the amount of their shares uncalled for, and therefore the transaction cannot be allowed to stand. The payments which were made cannot be treated as a satisfaction of their liability as shareholders, and the contention which has been raised on behalf of Colonel *Sykes* must be decided against him. He has no more claim to the sums which he has called fees, and pretended to pay but has not paid, than he has to those fees subsequent to August, 1866, which, during the discussion between himself and the *Oriental Financial Corporation*, claiming as creditors, he and the other directors consented to forego. He was no more entitled to pay himself than any other creditor of the company. Upon the construction of the articles of association, the decision, in my opinion, must be against Colonel *Sykes*' claim, and if the other conditions are pressed into the case, the directors who have thus dealt with the affairs of an insolvent company, keeping in view their own interest and disregarding the duties which they owed to the other shareholders in the company, cannot be regarded in any favourable light. The claim of the official liquidator will be allowed, and Colonel *Sykes* must contribute £22 on each of his shares.

Solicitors: Messrs. *Fox & Robinson;* Messrs. *Masterman & Hughes.*

LYCETT *v.* STAFFORD AND UTTOXETER RAILWAY COMPANY.

V.-C. B. 1872 *Jan.* 18.

[1870 L. 3.]

Railway Company—Unpaid Vendor—Lien—Injunction.

The Court will not, for the purpose of enforcing the lien of an unpaid vendor against a railway company for his purchase and compensation money, interest, and costs, restrain the company from running trains or engines over the land until the sale (directed by the order) of the land agreed to be taken.

Earl St. Germains v. *Crystal Palace Railway Company* (1) not followed.

THIS was an application on behalf of Plaintiff, an unpaid landowner, for the purpose of enforcing the lien in respect of purchase and compensation money, interest, and costs to which he had been declared entitled by the decree made on the 23rd of June, 1871, that the land agreed to be taken by the company, and of which they were in possession, might be sold, and that the company might be restrained from running trains or engines over the land until the sale.

In June, 1865, the company entered into an agreement to take, for the purposes of their undertaking, land belonging to the Plaintiff, and in August, 1865, they entered into possession. In August, 1866, it was arranged that the purchase should stand over on payment by the company of interest. Since March, 1867, the payment of interest had ceased, and the purchase-money remained unpaid.

In January, 1870, Plaintiff filed his bill for specific performance and consequential relief, and on the 23rd of June, 1871, he obtained a decree for, 1, specific performance; 2, an account of what was due to Plaintiff, with interest from the 26th of March, 1867, and payment by the company within three months from the date of the certificate, on payment of the amount Plaintiff to execute a proper conveyance to the company, and the company to pay Plaintiff's taxed costs of suit; 3, declaration that Plaintiff was entitled to a lien upon the land in respect of the purchase-money, with

(1) Law Rep. 11 Eq. 568.

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interest thereon at 5 per cent. from the 28th of March, 1867, as also for his taxed costs; 4, in case of default Plaintiff to be entitled to apply to the Court to enforce such lien.

On the 22nd of July, 1871, the Chief Clerk had certified that £813 5*s.* 8*d.* was due to Plaintiff for purchase-money, or compensation, and £172 1*s.* 11*d.* for interest. By the Taxing Master's certificate of the 21st of December, 1871, £104 6*s.* 11*d.* was found to be the amount of Plaintiff's taxed costs.

The amounts certified to be due not having been paid by the company, the Plaintiff now moved for a sale and an injunction for the purpose of enforcing his lien.

The company did not appear.

Mr. *Fischer*, for the applicant, referred to *Earl St. Germains* v. *Crystal Palace Railway Company* (1), where an unpaid vendor was held entitled, upon petition, to have the amount certified to be due to him for principal, interest, and costs raised by a sale of the lands, and in the meantime to an injunction restraining the company from continuing in possession of the lands, and a receiver. In *Munns* v. *Isle of Wight Railway Company* (2) Lord Justice *Giffard* discharged an order of the Vice-Chancellor *James* for an injunction restraining the company, until payment, from running any engine over, or otherwise using or continuing in possession of, the land (3); but it was submitted that the Court would not refuse to give effect to Plaintiff's lien by restraining them from running trains, which was no more than restraining them from continuing in possession of the land.

The VICE-CHANCELLOR, following the decision of Lord Justice *Giffard* in *Munns* v. *Isle of Wight Railway Company*, made an order for a sale of the land, Plaintiff to be at liberty to bid at such sale; and declined to grant an injunction.

Solicitors: Messrs. *White & Sons.*

(1) Law Rep. 11 Eq. 568. (2) Law Rep. 5 Ch. 414.
(3) Law Rep. 8 Eq. 653.

MILLER *v.* MILLER.

[1870 M. 231.]

V.-C. B.
1872
Jan. 23.

Tenant for Life and Remainderman—Open Brick-field—Devise for Sale at Discretion of Trustees—Royalties.

A testator, having purchased a piece of land, opened it as a brick-field, and it was open at his death. By his will he devised it to trustees upon trust to sell "when, in their discretion, it may seem advisable;" and he directed that the rents "and profits" should, until sale, be considered as part of his personal estate, and be applicable and applied in such manner as the dividends or interest to arise from the investments of the sale moneys. He then gave the income of the investments to a tenant for life, with remainder, as to the capital, over.

Royalties became payable after the testator's death. The trustees did not sell for ten years, but allowed the brick-field to be worked out, being of opinion that by holding the land for the present they might sell it at a higher price afterwards for building purposes:—

Held, that the tenant for life was entitled to the royalties absolutely, and not merely to the income which they would have produced if invested.

SPECIAL CASE.

In or about 1859 *William Bellingham*, having purchased in fee, for the sum of £1150, a field at *Portsea*, in the county of *Hants*, opened the same as a brick-field, and let it to a Mr. *Foster* at no fixed rent, but reserving a royalty for every 1000 bricks made.

On the 24th of July, 1860, *William Bellingham* made his will, whereby he devised his residuary real estate, including the brick-field, to *George Curtis* the younger and *Thomas Bartlett*, their heirs and assigns, upon trust to sell the same "when, in their discretion, it may seem advisable;" and he directed that the estates directed to be sold and the rents and profits thereof should, until sale thereof, be taken and considered as part of his personal estate, and be applicable and applied in such manner and for such intents and purposes as the dividends or interest of the money to arise from such sale would be payable or applicable under his will, in case such sale had actually taken place and the purchase-money been paid and invested before his decease. The testator then directed his trustees to invest the proceeds of the sale of his real estate and his residuary personal estate in Government, or real, or long leasehold, securities

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in *England;* and he declared trusts of such investments; the first trust being to pay an annuity to his wife; and as to the residue of his estate, upon trust to pay the income thereof to his daughter *Tamar Ann*, the wife of *Benjamin Miller*, for her separate use, without power of anticipation; and after the decease of his said daughter, then as to the principal and future income, in trust for her issue as she should by will appoint; and in default of such appointment, in trust for the child, if only one, and for all the children, if more than one, of his said daughter, such interest or interests to vest, as to children born before his decease, at thirty, or on their dying under that age leaving issue; and as to children born after his decease, at twenty-one, or on their dying under that age leaving issue, with accruer amongst the children as to non-vested shares; and if no child should acquire a vested interest, in trust for such persons or purposes and in such manner as his daughter, being discovert, should by deed to be duly executed, or, being covert, should by her will appoint; and in default of appointment, in trust for the children of testator's sister, *Ann Bettesworth*, in equal shares as tenants in common.

The testator died on the 5th of September, 1861. His daughter, Mrs. *Miller*, now had two children, infants; and his sister, Mrs. *Bettesworth*, had two children.

The case, which was filed by Mrs. *Miller*, by her next friend, as Plaintiff, against her two infant children and one of Mrs. *Bettesworth's* children (the residence of the other being unknown), and the trustees, *Curtis* and *Bartlett*, stated the above facts, and also that after the decease of the testator Mr. *Foster* still carried on his business of brickmaking on the brick-field, and finally used up all the brick earth, and the brick-field was in consequence given up by him, and the same was then let to a Mr. *Dawson*, a market gardener, at the rent of £22 10*s.* per annum, being the same rent that was paid for the field before Mr. *Foster* entered into possession.

The case then stated that at the testator's death the sum of £300, or thereabouts, was due from Mr. *Foster* on account of royalty, which sum had been paid; that Mr. *Foster* had also paid to the trustees for royalties the further sum of £551 1*s.* 8*d.*, and that he owed to them for royalties the further sum of £83 4*s.* 8*d.*; also that the brick-field had not been sold under the trusts of the will, the

trustees being of opinion that by retaining the same in their hands for the present, and selling it at some future time as building land, a greater price would be obtained.

The case then alleged that the trustees, under the circumstances above stated, considered that Mrs. *Miller* was entitled, if not to the whole of the royalty paid to them, at all events to a portion of the same; and had accordingly at different times made advances to her of portions of the royalty; but had not considered themselves justified in paying to her the whole without first obtaining the opinion of the Court.

The questions were:—

1. Whether all, or if not all, any, and if any, what portion of the said royalties becoming payable after the testator's decease should be paid to the Plaintiff, the said *Tamar Ann Miller*, as tenant for life under the trusts of the will above stated?

2. Or whether all or any, and if any, what portion of the royalties so becoming payable should be invested as capital trust property?

3. As to the costs of the suit?

Mr. *C. Hall*, for the Plaintiff:—

Irrespectively of the will, the tenant for life would be entitled to these sums, as to all other profits of the estate, absolutely.

But by the express terms of the will, the rents and "profits" of the estates, until sale, are made applicable in such manner as "the dividends or interest of" the investments of the sale moneys; *i.e.*, they are payable to the tenant for life.

The trustees have vested in them an express discretion with regard to the time of sale, and they have exercised that discretion by deferring the sale for a reason which they give, namely, that the property will probably improve in value as building land.

The right of the tenant for life is made clearer by the circumstances that the brick-field was opened by the testator himself, and was open at his death, so that the well-known rule relating to open mines applies: *Viner* v. *Vaughan* (1); *Daly* v. *Beckett* (2).

Upon the argument arising out of the terms of the will, viz., that the rents and profits are to go as the income of the personal estate

(1) 2 Beav. 466. (2) 24 Beav. 114. 3 Jur. N.S. 754

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goes, analogous cases occur with regard to long annuities and interests, which, from their nature, are not allowed to be retained as between tenant for life and remainderman, where there is a trust for conversion; and the question is, what is to be done with the income until conversion? In such cases the tenant for life has been held entitled to the intermediate income: *Sparling* v. *Parker* (1); *Wrey* v. *Smith* (2); *Mackie* v. *Mackie* (3).

Mr. *H. C. Ward*, for the infant Defendants:—

The tenant for life is entitled only to the income which these sums would have produced had they been invested.

The case is not governed by the authorities that have been cited. Here there is a discretionary power of sale. In *Viner* v. *Vaughan* (4) there was no trust for sale until after the death of the tenant fo life. In *Daly* v. *Beckett* (5) there was no direction or trust for conversion at all, but merely a power of leasing.

The decision of this case must depend upon what was the duty of the trustees; and the rights of the parties will be declared by the Court as if the trustees had exercised their discretion when they were bound to do so, viz., at a proper time, and before the property was exhausted. As to this the rules are very plain. If the sums had been sums paid for royalties arising out of an existing mine, they might have come under the designation of "profits." But the case here is, that the testator dying in 1861, the trustees have allowed the estate to be wasted to the extent of £630 in about ten years, so that it now yields only £22 10s. a year. The discretion of trustees must be exercised equitably or the Court will interfere.

In *Sparling* v. *Parker* Lord *Langdale*, M.R., expressly says (6): "I do not find any point made here that this is perishable or wearing-out property," which completely distinguishes the case. His Lordship further says (7): "It is very true that a trustee, having a discretion to exercise according to the best of his judgment, would not be allowed to exercise it in such a capricious

(1) 9 Beav. 524.
(2) 14 Sim. 202.
(3) 5 Hare, 70.
(4) 2 Beav. 466.
(5) 24 Beav. 114.
(6) 9 Beav. 527.
(7) 9 Beav. 528.

manner as to be injurious to any party." The conduct of these trustees has certainly been injurious to the remaindermen.

In *Wrey* v. *Smith* (1) the trust was to convert "with all convenient speed," and the question turned solely upon the construction of the word "convenient" (2).

Authorities in favour of the Defendants' contention are: *Walker* v. *Shore* (3); *Wilkinson* v. *Duncan* (4); and the observations of the Master of the Rolls in *Yates* v. *Yates* (5).

Mr. *Casson*, for the trustees.

SIR JAMES BACON, V.C., after stating the question, and observing that the reason why the sale was not effected—namely, that the trustees were of opinion that, by retaining the land in their hands for the present, and selling it at some future time as building land, "a greater price would be obtained"—formed part of the case, continued:—

The general law upon the subject is very well understood.

The facts in this case are, that the testator, having purchased a piece of land, and opened it as a brick-field, in respect of which some royalties had been received, and others were then due, makes his will, whereby he devises his residuary real estate, including this brick-field, to trustees and their heirs, upon trust to sell the same "when in their discretion it may seem advisable;" and directs that the "rents and profits" thereof shall, until sale, be "taken and considered as part of his personal estate, and be applicable and applied in such manner, and for such intents and purposes, as the dividends or interest" of the sale moneys, when invested, would be payable; and then gives a life estate in the investments to his daughter. She is entitled not only to the rents, but to the rents and "profits;" and I cannot disregard this word "profits," especially as the testator was in his lifetime deriving profits from this very property.

It is not denied that the tenant for life is entitled to the profits of the property, but it has been contended that it is not competent

(1) 14 Sim. 202.
(2) Ibid. 211.
(3) 19 Ves. 387.
(4) 23 Beav. 469.
(5) 28 Beav. 637, 641.

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for the trustees, by a capricious exercise of their discretion, to prejudice the rights of the remaindermen. Now, if there had been, in my opinion, any capricious exercise of the trustees' powers, I should have listened to Mr. *Ward's* argument, who contends that the tenant for life is entitled only to the interest on these profits, as if the trustees had sold the property.

But it is plain upon the will that no sale can take place unless the trustees think fit; and that they may sell whenever they like.

Then it is said that, by not selling, they have given a benefit to the tenant for life. But by the general law a tenant for life has the right to the proceeds of an open brick-field, and that right can only be controlled by the exercise by the trustees of their discretion to sell the land; and as to the due exercise by the trustees of their discretion, if the facts are correctly stated, nothing that has been done has diminished the interest of the persons in remainder.

The question must be answered to the effect that all the royalties becoming payable after the testator's decease belong to the Plaintiff as tenant for life.

The costs of all parties, as between solicitor and client, will come out of the fund.

Solicitor for all parties: Mr. *Fortune.*

In re "THE MEYRICKE FUND."

V.-C. W. 1872 Jan. 11.

The Meyricke Fund, Jesus College, Oxford—The Endowed Schools Commissioners—Jurisdiction—Discovery—District—Endowed Schools Act, 1869 (32 & 33 *Vict. c.* 56)—*Charitable Trusts Acts*, 1853 *and* 1855 (16 & 17 *Vict. c.* 137, *and* 18 & 19 *Vict. c.* 124).

The Endowed Schools Commissioners have jurisdiction to compel a college in an University to make discovery of matters relating to an endowment of which the college are trustees, for exhibitioners selected from a particular district, and whose exhibitions are tenable at the university.

Wales is a district within the *Endowed Schools Act*, 1869 (32 & 33 Vict c. 56).

Affd by L.C. 2 Ch. 102 (CA 500

MOTION.

The Rev. *Edmund Meyricke*, by his will, dated the 25th day of March, 1712, after reciting (*inter alia*) that he had always intended to bestow a good part of what God should please to bless him withal for the encouragement of learning in *Jesus College*, in *Oxford*, and for the better maintenance of six of the junior scholars who were, or should be, scholars of the foundation of the said college, out of the six counties of *North Wales*, gave, devised, and bequeathed all his real and personal estates (except as therein mentioned) unto and for these several uses and purposes—that was to say, unto every one of the said six scholars particularly and severally the annual sum of £10 of lawful money of *Great Britain* during his residence in the said college; and for the maintenance and settlement of six exhibitioners in the said college, natives of the six counties of *North Wales*, or of any or either of the said six counties, and of his kindred, if such, of that number of exhibitioners, else such exhibitioners to be others of the said six counties to make up the number of six. He gave to each and every of the said six exhibitioners the annual sum of £8 of lawful money of *Great Britain* during his residence in the said college. The said £10 per annum to each and every of the said scholars, and the said £8 per annum to each and every of the said exhibitioners as aforesaid, to be paid unto them severally and respectively yearly and every year during their respective residence in the said college as aforesaid out of the yearly rents, issues, and profits of his said estate; and the remainder of the yearly rents

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issues, and profits of such part of his estate (other than as thereinbefore excepted) he gave, devised, and bequeathed to and for these further uses and purposes—that was to say, for the buying of advowsons of rectories, impropriations, or vicarages, whereto the principal for the time being, and the fellows of the said college, should or might, as patrons thereof, present fit persons thereto out of the said number of the said six scholars; or, if it happened that there were none of such scholars capable to be presented thereto, then any of the said six exhibitioners that should be capable to be presented thereto should be so presented thereto; such scholars and such exhibitioners to be so presented to such advowsons of such rectories, impropriations, or vicarages as there should be any vacancy or vacancies of such livings or benefices; or if it happened that there were none of such scholars or of such exhibitioners capable to be so presented thereto, then one of the *North Wales* fellows of the said college was to be presented instead of such of the said scholars or of such of the said exhibitioners as should not be capable to be presented as aforesaid to such vacancy as might be of such of the said rectories, impropriations, or vicarages. And his will and further meaning and intent was, as to the said exhibitioners, that they and each and every of them should be well and duly paid yearly the said sum of £8 per annum as aforesaid until they did or should take their several and respective degrees of masters of arts, or until they or any or either of them should have, receive, and enjoy a cure of souls really worth £40 per annum; and he did thereby give, devise, and bequeath such part of his said estate so given, devised, and bequeathed for and to the said six scholars and the said six exhibitioners, and for the buying of such advowsons of rectories, impropriations, or vicarages as aforesaid, and for the uses and purposes aforesaid, and the yearly rents, issues, and profits thereof yearly, and every year for ever, for and to the same uses and purposes for ever, and to and for no other use, intent, or purpose whatsoever. The testator then nominated and appointed four trustees to order and manage his said estate, and provided that from and after the deceases of the said four trustees, then for the future and for ever the trustees of his said estate so given, devised, and bequeathed as aforesaid to and for the said six scholars and the said six exhi-

bitioners, and for the buying of such advowsons as aforesaid for the uses and purposes as aforesaid, and all and every the matters and things relating to the same as aforesaid, should be the principal of the said *Jesus College* for the time being, and two of the senior fellows of the said college for the time being for ever; and they were by him thereby constituted, authorized, empowered, and appointed to be such trustees for the said uses and purposes relating to the said college as aforesaid, and to act and do in and touching the same, and in and concerning such part of his said estate so given and devised and bequeathed for and towards the six scholars and the said six exhibitioners, and the buying of such advowsons as aforesaid for the uses and purposes aforesaid; and the management of such part of his said estate as appropriated to and for those uses and purposes as aforesaid from time to time, and at all times, as occasion should be, as they should think fit or judge necessary yearly, and in every year for ever, that the same might be truly and duly done as aforesaid, yearly and in every year for ever, according to his true intent and well-meaning therein expressed, for the said several uses and purposes as aforesaid.

The testator, by a codicil dated the 14th of May, 1712, devised a piece of land at *Bala*, in *Merionethshire*, for the use and benefit of a school; and made certain provisions out of the rents of his estates in *Merionethshire*, "above the sum of £108 per annum by him given by his last will to six scholars and six exhibitioners in *Jesus College*, in *Oxford*," and otherwise, for the maintenance of the schoolmaster and thirty scholars at *Bala*. The testator died in the year 1713.

The *Meyricke* property increased very much in value, and was administered under many decrees of this Court; by whose authority the six scholars received £40 each annually, instead of £8; and the exhibitioners were increased in number to twenty-four, and in value to £35 annually.

By an ordinance dated the 3rd of April, 1857, framed by the Commissioners under the *Oxford University Government and Extension Act*, 1854, 17 & 18 Vict. c. 81, clause 36, it was provided that "the emoluments of the twenty-four exhibitions of the foundation of *Edmund Meyricke*, Clerk, of the three exhibitions of the foundation of Mr. *Bloom*, and of the two exhibitions of the

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foundation of Mr. *Rice Powell*, should be consolidated, as the same respectively became vacant, and applied in maintaining as many exhibitions of the value of £40 per annum respectively as the amount of the said consolidated emoluments for the time being would allow; that the exhibitions should respectively be filled up by the election of deserving persons, being natives of *Wales* or *Monmouthshire*, whom the principal and fellows should have ascertained to be in need of support at the University; provided that no person should be elected whose merit and fitness to be an exhibitioner should not have been previously tested by an examination: that no person should be entitled to preference or ineligible in elections to any of the said exhibitions, by reason of his place of birth, otherwise than by reason of his being a native of *Wales* or *Monmouthshire* as aforesaid; that no person should be eligible to any of the said exhibitions who should be a scholar of the college, and every exhibitioner who should be elected to a scholarship within the college, should thereupon vacate his exhibition; and that each of the said exhibitions should be tenable until the holder thereof should have completed his twentieth term inclusive from the date of his matriculation, and no longer." And by the 37th clause, "That notice of every intended election to any of the exhibitions should be given by the principal in such manner as he should deem best adapted to insure publicity, thirty days at least before the day of election."

In 1861 a decree was pronounced in a suit of *Attorney-General* v. *Jesus College* (1860 A. 51.), by which the school at *Bala* was declared entitled to a proportionate part of the improved surplus rents of the testator's *Merionethshire* property. In 1870 a scheme was approved by the Master of the Rolls, by which the ordinance of 1857 was carried out, and the annual sum of £840 appropriated to the purposes of the 36th clause of it. In 1871 the Endowed Schools Commissioners called upon the Principal of *Jesus College*, to answer certain inquiries with reference to the *Meyricke* endowment. A long correspondence ensued, in the course of which the Commissioners avowed their desire of investigating the endowment, quite independent of any connection between it and the school at *Bala*. Eventually the college declined to furnish the Commissioners with the information they required.

By the *Charitable Trusts Act*, 1853 (16 & 17 Vict. c. 137), s. 11, all officers having the custody of records are bound to furnish copies and extracts, if required by the Board of Commissioners under that statute; and by sect. 14 any person refusing to render accounts, statements, or answers to the board, when requested so to do, or to attend before them, if desired, is liable to summary committal for contempt of this Court. By the *Charitable Trusts Act Amendment Act*, 1855 (18 & 19 Vict. c. 124), ss. 6, 7, 8, and 9, the powers of the Commissioners and inspectors to inquire into charities were enlarged; and by the *Endowed Schools Act*, 1869 (32 & 33 Vict. c. 56), s. 49, all those powers were further extended to the Commissioners under that statute.

Those Commissioners now therefore moved, formally only, in the above matters, for an order of committal against the bursar (as the actual custodian of the documents relating to the *Meyricke* fund), and a writ of sequestration against the property of the college as for a contempt of Court.

The following were the inquiries stated in the notice of motion:—

(*A.*) An account of the property belonging to the said endowment.

(*B.*) An account of the receipts and expenditure for the four years ending the 31st of December, 1870.

(*C.*) A list of the persons holding exhibitions under the foundation.

(*D.*) A list of the trustees in whom any portion of the endowment is legally vested.

(*E.*) A list of the managing trustees, if different from those who hold the property.

(*F.*) A statement of the schemes, statutes, or ordinances which now govern the endowment.

The motion also asked that the college might be ordered to pay the costs of it.

Sir *Roundell Palmer*, Q.C., and Mr. *Lindley*, for the Commissioners:—

First, as to the form of the motion, cited the statutes and sections above particularly referred to.

Secondly, as to the question of jurisdiction, said:

The first consideration is the constitution of the *Meyricke* Fund.

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In re "THE MEYRICKE FUND."

In treating of that we shall deal with the exhibitions only, and not the scholarships. The exhibitions are provided for by property vested in trustees (the college now filling that capacity) appointed by the testator himself, and not in the college, *quâ* college.

By the *Oxford University Act*, 1854 (17 & 18 Vict. c. 81), sect. 28, the colleges in *Oxford* are empowered to amend their statutes with respect to eligibility to headships, fellowships, and other college emoluments, and the tenure thereof; and by sect. 48, the expression "university or college emolument" includes all fellowships, studentships, scholarships, and exhibitions, and every other such place of emolument payable out of the revenues of the university, or of any college, or to be held and enjoyed by the members of any college or hall, as such, within the university. These exhibitions were not thrown open under that statute; and they now remain as fixed by the Ordinance of 1857, viz., restricted to natives of *Wales* or *Monmouthshire*, not connected with any particular school, but limited only as to district.

By the *Endowed Schools Act*, 1869 (32 & 33 Vict. c. 56), sect. 4, the word "endowment" applies to every description of property dedicated to the uses of that Act, in whomsoever vested, and in whosesoever's name it may be standing. By sect. 5 the term "educational endowment" means an endowment, or any part of one, which, or the income whereof, has been made applicable to, or is applied for, the purposes of (*inter alia*) exhibitions, tenable at a school, or an university, or elsewhere." By sect. 7 the term "exhibition" means any exhibition, scholarship, or other "like emolument;" and the term "exhibitioners," and other terms referring to exhibitions, are to be construed accordingly. So far, therefore, it is clear that the exhibitions connected with this fund are *primâ facie* within the reach of the Endowed Schools Commissioners. They are emoluments like scholarships, and are educational endowments tenable at an university; and by sects. 9 and 10 the Commissioners are empowered to make schemes for the application of educational endowments. It is said, however, that the words "tenable at the university" must, on account of the scope and object of the Act, be restricted to exhibitions held at the university, but in connection only with some particular school, either there or elsewhere. Now sect. 8 of the Act specifies the schools

to which the Act is not intended to apply, and clause 6 of that section exempts from its operation any "endowment" applicable and applied solely for promoting the education of the ministers of any church or religious denomination, or for teaching any particular profession (unless it is otherwise subject to the Act) which receives assistance out of such endowment—an exemption which manifestly does not touch such a fund as the present. Then sect. 14 of the Act points out the endowments and other matters to which the schemes to be framed by the Commissioners must not extend. Clause 4 of that section forbids their interfering with the constitution of the governing body of any school, or with any exhibition (other than one restricted to any schools, or school, or district) forming part of the foundation of any college in *Oxford* or *Cambridge* unless the college assent to the scheme; and sect. 38 provides that where a scheme abolishes any restriction which makes an exhibition tenable only at a particular college or hall, and the exhibition is payable out of property held by the college, or by the University in trust for such college or hall (otherwise than as governing body of a school, or a bare trustee), the scheme shall not be approved of if not less than two-thirds of the governing body of such college or hall dissent therefrom in writing. Adequate force must be given to these sections of the Act, and it will then appear that either the definition of an educational endowment given in the first part of sect. 5 is not confined (as the college insist) to cases *ejusdem generis* with those specified in the latter part of the same section, or payments to scholars at an university are reckoned as *ejusdem generis* with payments to scholars at a school. If such endowments as *Meyricke's* are excluded from the Act, it is difficult to see in what cases sect. 14, clause 4, and sect. 38 are meant to operate. These exhibitions are not restricted to any school, though they are limited to a particular district; and inasmuch as they are kept up by property vested in the college, as special trustees of it, they do not form part of the foundation of the college. We therefore say that the Commissioners have the jurisdiction they claim, and that the college must furnish them with the information they require.

Thirdly: As to the schemes. The Act specifies two sorts. (1.) Those which the Commissioners may themselves frame and

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enforce under sects. 9 and 10; and (2) draft schemes to be prepared by them under sects. 32, 36, 38 (*et seq.*), and afterwards submitted by them to the respective colleges or halls for their assent. Assuming therefore that the Commissioners are not entitled (which is more than the college can possibly say) to frame a scheme themselves, they are at all events right in asking for the information to enable them to prepare a draft scheme to lay before the college.

Mr. *Morgan*, Q.C. (Mr. *Dickinson*, Q.C., with him), and Mr. *Grenside*, for the Respondents, did not object to the form of the motion, which was the best and cheapest mode of determining the question.

As to the question of jurisdiction, they said: The general consideration is, whether this *Meyricke* endowment is an educational one at all within the scope of the Act of 1869? We say that it is not. When the Act was passed endowments in *England* had been greatly abused. The direct and immediate object of the Act (and that must never be lost sight of) was to remedy those abuses. The title of the Act shews that, viz., "An Act to amend the Law relating to Endowed Schools and other Educational Endowments in *England*, and otherwise to provide for the Advancement of Education." The words "emolument and educational endowment" must therefore be taken in strict connection with the purposes of the Act. It will then be seen that schools alone, and not the universities, are the subject of the Act. Sect. 9, which has been referred to, shews that. It enables the Commissioners to frame schemes that may render any educational endowment most conducive to the advancement of the education of boys and girls, or either of them. But there are no girls' schools at either university. Sect. 15 is also directly in point as to that.

As to the particular arguments adduced to bring this fund within the Act: it is said that "exhibition" means an exhibition scholarship, or other like emolument, and that it is an educational endowment within sect. 5. But that is impossible if the whole of that section is carefully examined. No doubt the term educational endowment includes, as alleged on the other side, "exhibitions tenable at a school or an university or elsewhere," but that definition is very

much restricted by the latter part of the same section. That part has been referred to in the argument on the other side, but not fully considered. Having, therefore, a strict regard to that part of the section, the endowments intended to be included in the Act must be those which, or the income whereof, have been made applicable, or applied, for the following purposes: First, for the purpose of education at school of boys or girls, or either of them [the *Meyricke* fund, of course, is not one of that kind. Then the section goes on], or of exhibitions tenable at a school, or an university, or elsewhere, made so applicable whether "in the shape of payment to the governing body of any school, or any member thereof, or to any teacher or officer of any school, or to any person bound to teach, or to scholars in any school or their parents, or of buildings, houses, or school apparatus for any school, or otherwise howsoever." That is to say, applicable to matters *ejusdem generis* by any such, or the like means. The *Meyricke* fund is not within any of those definitions. We submit that no endowment which is not purely scholastic is within them. No one can be brought within the Act unless it possesses some one or other of the characteristics in the latter part of sect. 5; which the *Meyricke* endowment certainly does not. If this motion had related to the school at *Bala*, it would have been an intelligible one; but if it is to prevail against our interpretation of the Act, the *Ireland*, the *Hertford*, and the *Craven*, and other such like scholarships, to say nothing of professorships and fellowships also, may all be swept into the jurisdiction of these Commissioners. That never was intended by the Legislature; and we feel confident that if such endowments as this *Meyricke* fund are within the Act, it must be so through some inadvertency only. It is of great importance to consider the will of Mr. *Meyricke*, the founder of this endowment. [He read the will as above stated, and continued:—]

We are not now concerned with the codicil; but the will vests the property in the trustees named by the testator, and for what purpose? why, the encouragement of learning in *Jesus College, Oxford*. That is a form of donation very common with founders and benefactors of colleges in the universities, and it seems extremely difficult, if not impossible, to say that property so given and devoted as this is, and so dealt with by the decrees and orders

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of this Court as this has been, does not now constitute part of the foundation of the college. If it does, it is clearly not within the jurisdiction of these Commissioners, as all such property is, together with the other specified matters, carefully exempted from the operation of the statute (sects. 8 and 14). But this fund has been well and effectually settled by the Master of the Rolls in 1870. If the scheme of which he then approved is correct—and we say it is—why is this motion made? and, if made, on what possible grounds can it be justified? None have been shewn. These Commissioners, having jurisdiction in school matters, may be the worst possible judges of the requirements of such a foundation as this, and may suggest the most impracticable scheme that can be conceived instead of the one we have, and which now works admirably.

Lastly, we say that *Wales* is not a district within the meaning of that word in the Act. The district must be "a district of or in *England*." The word district itself only occurs once in the Act; and in sect. 11 the word "area" is used as its equivalent. If it is correct to say that *Wales* is a district of *England*, why should not *Scotland* or *Ireland* be so called? An area co-extensive with the old principality of *Wales* cannot, by any reasonable intendment, be an "educational district."

Sir *Roundell Palmer* was not called upon to reply; but, as to the costs of the motion, cited *In re Sir Robert Peel's School* (1).

Sir John Wickens, V.C.:—

It is argued in this case on behalf of the Endowed Schools Commissioners, that they have the power of making a scheme with regard to this fund; in which case they are entitled to the discovery that they seek. And it is further argued, that even if they have no power to make a scheme operative without the assent of the college, they are still entitled to the discovery which would enable them to frame a draft scheme for the purpose of seeing whether the college would consent to it or not. From the view that I take of the other point, it is not necessary to decide this. It is also unnecessary to decide whether this fund is or is not part

(1) Law Rep. 3 Ch. 543.

of the foundation of *Jesus College*—a point which seems to me to admit of considerable argument. I prefer to decide the case on a broader ground. Mr. *Morgan* may or may not be justified in saying that if this endowment is within the Act of 1869, it is so by inadvertence, and not intentionally. If the words of the Act clearly bring it within the jurisdiction of the Commissioners, I must give effect to those words. But I may suggest that nothing could have been more conformable to the apparent intention of the Act than that, in a case, for example's sake, where there was an endowed school in a particular parish, and exhibitions for the use of the parishioners not connected with the school, the Commissioners should have power to deal with both together. Many more instances might be adduced. I think the words of the Act do bring this endowment within the jurisdiction of the Commissioners, if the 5th and 14th sections receive their natural construction. It seems to me not a fair construction to restrict the general expressions in the 5th section by the latter part of it, especially considering the words "otherwise however," and that there are no other words in the latter clause which refer to exhibitions "tenable at an university." Yet exhibitions tenable at an university are expressly mentioned in the 5th section, and also in the 14th section, which limits to some extent the powers of the empowering sections.

It is said that this is not a "district," because it is co-extensive with the old principality of *Wales;* and that to adopt the Commissioners' view is to treat the old principality as a district of *England.* Surely this is a district in ordinary parlance just as the county of *Durham* or the counties of *Middlesex* or *York* would be districts: though the Act of Parliament probably contemplated much smaller districts both here and in the 11th section. It is also said that the Commissioners might make a scheme which would not be a proper one, having regard to the nature and origin of this foundation. If so, there is a remedy. Therefore I decide that the Commissioners have the jurisdiction that they claim, and are entitled to the discovery: and with costs.

Solicitors for the Commissioners: Messrs. *Farrer, Ouvry & Co.*
Solicitor for the College: Mr. *F. C. Clarke.*

V.-C. W.
1872
Jan. 13.

Post 493.
10 L.D. 290

HIGGS *v.* DORKIS.

(1871 H. 213.]

Partition Act, 1868 (31 & 32 *Vict. c.* 40), *s.* 3—*Plaintiff, Disability of*—*Decree for Sale.*

The Court will, under the *Partition Act*, 1868, make a decree for sale, instead of partition, at the request of a *feme coverte* Plaintiff.

MARY LUCK purchased, and on the 17th of May, 1842, was duly admitted to, a piece of copyhold land, parcel of the manor of *Edmonton*, in the county of *Middlesex*, to hold the same to her, her heirs and assigns, for ever, at the will of the lord, according to the custom of the manor.

She died a spinster, and intestate, on the 31st of December, 1870, seised of the land.

At her death, *Mary*, the wife of *Henry Higgs*, and *Henry Dorkis*, an infant, were her co-heirs, according to the custom.

On the 11th of July, 1871, *Mary Higgs* was duly admitted tenant to one undivided moiety of the land, to hold the same to her and her heirs for ever, according to the custom.

Henry Dorkis was also duly admitted by his father and guardian to the other undivided moiety, to hold the same to him and his heirs for ever, according to the custom.

The bill in this suit was filed by *Henry Higgs* and his wife against the infant *Henry Dorkis*. It stated the above facts; that the tenure of the land in undivided moieties was inconvenient and undesirable; and that all parties wished that the land should be partitioned or sold. It prayed that their rights might be declared, and that partition might be made of the land, and the shares of the parties entitled allotted to them in severalty; or that the land might be sold, and the proceeds divided among the parties, according to the declaration to made as above prayed.

Mr. *E. Cutler*, for the Plaintiffs, referred to the *Partition Act*, 1868, s. 4.

[The VICE-CHANCELLOR:—You ask for a sale of real estate on

V.-C. W. 1872 HIGGS v. DORKIS.

the request of a married woman. Her inheritance in the estate will be converted by the sale into money; and although her husband cannot touch the former, he may the latter.]

Mr. *E. Cutler* then referred to sect. 3, and said:—I have evidence to prove that a sale and a distribution of the proceeds of the property would be more beneficial for the parties interested than a division of it between or among them.

Mr. *Vincent*, for the Defendant, asked that the purchase-money to arise from the sale might be paid to trustees for the parties.

SIR JOHN WICKENS, V.C., after referring to *France* v. *France* (1), continued:—

I will make a decree, as prayed by the bill, for the sale of the land. The purchase-money must be paid into Court, and there must be a vesting order as to the infant's share, with a reservation of further consideration.

Solicitors: Messrs. *Farrer, French, & Tatham;* Mr. *Percy C. F. Tatham.*

BOURDIN *v.* GREENWOOD.

V.-C. W. 1871 *Nov.* 22; *Dec.* 9.

[1870 B. 102.]

Promissory Note—Subsequent Indorsement by Maker of his Name and Date—Statute of Limitations—Lord Tenterden's Act—Acknowledgment of Debt.

L., in 1846, promised to pay, three months after date, to *B.* or to *C.*, his wife, the sum of £500. *B.* died in 1863, leaving *C.* surviving. There was an indorsement on the note in *L.'s* handwriting of his name and the year 1866. *C.* died in 1868:—

Held, that it was not intended to make a new note, and that there was a sufficient acknowledgment to exclude the *Statute of Limitations.*

THE Rev. *William Hawkes Langley* having, prior to 1846, borrowed several sums of money from *Dominic François Bourdin*, to enable him to carry on certain literary pursuits by means of

(1) Law Rep. 13 Eq. 173.

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which he was struggling to maintain himself, gave, in that year, a promissory note in the form following:—

"*Wheatly, Oxon.* January the sixth, 1846.

"Three months after date I promise to pay to *Dominic François Bourdin*, Esq., or to *Sarah Matilda Bourdin*, his wife, the sum of five hundred pounds for value received.

£500 0*s.* 0*d.* *William Hawkes Langley.*"

D. F. Bourdin, who died on the 30th day of October, 1863, by will dated the 25th day of July, 1856, appointed *S. M. Bourdin* his sole executrix, and she proved the will. In January, 1866, *S. M. Bourdin* represented to *W. H. Langley* that he ought to sign some document which would give her a legal claim notwithstanding the lapse of time. He proposed to her that he should sign the promissory note anew, and alter the date, and suggested that that would be sufficient acknowledgment to keep the debt alive. He altered the date of the promissory note from 1846 to 1866; signed the note on the back thus:—"*W. H. Langley*, 1866;" and handed it so signed to *S. M. Bourdin*.

S. M. Bourdin, who died on the 14th day of January, 1868, by will dated the 5th of June, 1865, appointed the Plaintiff, *François Hippolyte Bourdin*, her sole executor, and he proved the will. *W. H. Langley* was for many years in pecuniary difficulties, and incurred heavy expenses in litigation, in which he, after the death of Mr. and Mrs. *Bourdin*, established his title to some real estate of the value, as alleged, of £10,000 or £12,000.

W. H. Langley, who died on the 16th of February, 1870, by will in January, 1869, after bequeathing a legacy of £300 to *Henry Hansler*, in consideration of his advances to him of £300 or £350, gave the rest of his property, real and personal, to the Defendants, *Henry Greenwood* and *Phoebe Greenwood*, in certain shares, the share of *Phoebe Greenwood* to be divided equally among all her children living at her death, share and share alike. In February, 1870, administration with the will annexed of the estate and effects of *W. H. Langley*, was granted to the Defendant *Henry Greenwood*.

The Plaintiff prayed that the sum of £500 owing to the estate of *D. F. Bourdin* or *S. M. Bourdin*, together with such interest thereon as the Court should think fit, might be paid to the Plaintiff

by a short day, or that in default the personal and real estate of *W. H. Langley* might be administered under the direction of the Court, and that the real estate might be sold; for accounts and inquiries, and for a receiver.

Mr. *Karslake*, Q.C., and Mr. *E. Cutler*, for the Plaintiff:—

The original note was dated in January, 1846. There has been an alteration in the figures, but how, by whom, and under what circumstances it was made there is no evidence at all. It is not, however, material to fix the precise date of the alteration, as the debtor wrote his name and the figures "1866" on the back of the note; and that is a perfectly good acknowledgment. It was not necessary that the amount of the debt should be stated in the acknowledgment. This was not a commercial transaction, but a case of assistance rendered to a poor man. Though there is no case in the books where the signature of the debtor on the back of a note has been held to be an acknowledgment, yet, having regard to the alteration made and to the other circumstances, there is enough to relieve the Court from deciding that the Plaintiff has no claim because of the *Statute of Limitations*.

It is submitted that a fresh stamp was not necessary, but if it should be considered that it was necessary, the document can be stamped now.

[They referred to *Jones* v. *Ryder* (1); *Rendell* v. *Carpenter* (2); *Cheslyn* v. *Dalby* (3); *Blanckenhagen* v. *Blundell* (4); *Hart* v. *Prendergast* (5); *Dabbs* v. *Humphries* (6); *Darby & Bosanquet* on Statutes of Limitations (7); *Byles* on Bills (8); 9 Geo. 4, c. 14, s. 8 (Lord *Tenterden's Act*).]

Mr. *Hemings* (Mr. *Dickinson*, Q.C., with him), for the Defendant:—

If the signature and date 1866 constituted a promise to pay, the note was made a new one, and as such, it should have been restamped. That not having been done, the Defendants are entitled to say that there is nothing to sustain this suit. If that objection

(1) 4 M. & W. 32.
(2) 2 Y. & J. 484.
(3) 4 Y. & C. Ex. 238.
(4) 2 B. & A. 417.
(5) 14 M. & W. 741.
(6) 10 Bing. 446.
(7) Chap. iv., p. 45, 49, *et seq.*
(8) 10th Ed. p. 347.

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should not be considered a sufficient defence, then it may be contended that there is no proof that the signature of the debtor on the back of the note was written in 1866; and that being so, there is nothing to take the case out of the *Statute of Limitations*.

[He cited *Holmes* v. *Jaques* (1), *Rackham* v. *Marriott* (2), and *Hamelin* v. *Bruck* (3).]

Mr. *Karslake*, in reply, referred to *Ex parte Yates* (4).

During the arguments some letters written by the parties were read and commented upon, but in the view of the Court they were not evidence.

Dec. 9. SIR JOHN WICKENS, V.C.:—

This is a creditor's suit, and the only question is whether the debt in respect of which the Plaintiff sues is barred by the *Statute of Limitations*. The Rev. *William Hawkes Langley* gave to *Dominic François Bourdin*, who had lent him money, a promissory note dated the 6th of January, 1846, by which he promised to pay to *Dominic François Bourdin*, or to *Sarah Matilda Bourdin*, his wife, £500 at three months after date. *Dominic François Bourdin* died in 1863, and his wife *Sarah Matilda* became his executrix. She died in January, 1868, and the Plaintiff is her executor, and the derivative executor of *Dominic François Bourdin*. The Defendants are the administrator and the devisees of *Langley*, the debtor. Of course the debt is barred by the statute unless there has been something to exclude its operation. What is relied on by the Plaintiff for that purpose is an indorsement on the note in *Langley's* handwriting, which is as follows: "*W. H. Langley*, 1866." The production of the note with this indorsement upon it is the only evidence in support of the Plaintiff's case. Some letters in 1869 were relied on at the bar, but those not having been pleaded cannot operate as an acknowledgment for the present purpose; and it is therefore unnecessary to consider their effect.

(1) Law Rep. 1 Q. B. 376.
(2) 1 H. & N. 234.
(3) 9 Q. B. 306.
(4) 2 De G. & J. 191.

It is difficult, I think, to resist the inference that Mr. *Langley* must have indorsed his name, and the date 1866, on the note for the purpose of acknowledging that the debt was then due: that he did it for some purpose is clear, and it is hardly possible to suggest any other. It must be taken that some time in the year 1866 Mrs. *Bourdin*, who was one of the alternative payees and the executrix of the other, produced the note to the maker, who then indorsed it, and wrote the year when he did so, and handed it back to her. If he had prefixed "Due," or any similar word, the matter would have been too clear for argument, since the paper itself identified the debt; and the question is, whether the want of the word makes any difference. I think that it does not on principle, and that it would be too narrow a construction of Lord *Tenterden's Act* to say that there is here no acknowledgment made or contained in a writing signed by the party chargeable. It is true that there is here no writing except the signature and the date, but if they together involve an acknowledgment, as I think they do, the want of any other writing can hardly be fatal. It should be mentioned that on the note itself the date 1846 was converted into 1866, and this alteration is pleaded by the Plaintiff as done by Mr. *Langley* at the time of the indorsement. There is no proof that it was so, though the thing seems not improbable. It was urged that that alteration disclosed an intention to make a new promissory note, and not to acknowledge an existing one, and that the case is one not of old note and acknowledgment, but of new note, bad for want of a stamp. Considering that the original signature is not cancelled; that the note is still left as an alternative promise to pay to two persons, one of whom was dead, and that the new signature is written on the back of and across the note, I think it the better conclusion that it was not really intended to make a new note in the strict sense of the word, but simply to acknowledge an existing one. The Plaintiff is, therefore, entitled to the usual decree.

Solicitors: Messrs. *Cutler & Turner;* Mr. *J. P. Poncione,* Jun.

V.-C. W.
1871
Dec. 8, 21.

In re ROSS'S TRUSTS.

Statute of Distributions (22 & 23 *Car.* 2, *c.* 10)—*Grandchildren and Great-grandchildren—Division per Stirpes.*

A fund was divisible under the *Statute of Distributions* among grandchildren and great-grandchildren, claiming by two lines of descent from their common ancestor:—

Held, that the fund must be divided into moieties; and each moiety subdivided between the respective descendants *per stirpes* and not *per capita*.

THIS was a Petition presented by *Margaret Mary Dumaresq Ross*, an infant (by her mother, as her next friend), the Rev. *Thomas Fletcher* and *Mary Dumaresq*, his wife, and *Percy Wheeler Child* and *Georgina Emily Howard*, his wife; and it prayed (after providing for costs) that the residue of a sum of £9000 15*s.* 11*d.*, £3 per Cent. Consolidated Bank Annuities, in Court, to an account intituled "In the Matter of the Trusts of the Will of *Alexander Ross*, deceased, the Share bequeathed to *Margaret Ross*, with remainders over," might be divided into two equal half parts; that one-third of one of such equal half parts might be carried over to "the account of the Petitioner, *Margaret Mary Dumaresq Ross*, an infant under the age of twenty-one years; that another third of one of such equal half parts might be transferred to the Petitioner, the Rev. *Thomas Fletcher*, in right of his wife; that the remaining third of one of such equal half parts might be transferred to the Petitioner, *Percy Wheeler Child*, in right of his wife; and that the other of such equal half parts might be divided amongst, or applied for the benefit of, the several persons claiming (as hereinafter stated) under the testator's son, *William Francis Ross*; or else that the trust fund might be divided between the Petitioners and the several other persons interested therein, in such shares and proportions as they were respectively entitled to.

Alexander Ross, by his will, dated the 17th of November, 1819, bequeathed certain specific articles to trustees, upon trust for his wife during widowhood, and after her decease or marriage, upon the trusts declared concerning the residue of his real and personal estate. The testator then bequeathed a sum of £1500, *East India*

Stock, to his trustees for the benefit of his wife during her widowhood; and directed that, on her decease or marriage, one moiety of it was to be held upon the trusts declared concerning the share of his daughter *Mary Ross* in his residuary estate; and the other moiety upon the trusts declared concerning the share of his daughter *Margaret Ross* in his residuary estate. He then bequeathed a sum of £2000 to his trustees to invest and hold the same upon trust in the event of *Margaret Ross* attaining twenty-one years, and thenceforth, until her marriage or death unmarried, to pay the produce of the fund to her and her assigns for her and their own benefit; and after her decease, upon the trusts declared concerning her share of his residuary estate. He then, after making certain pecuniary and specific bequests, devised all his real, and bequeathed the residue of his personal, estate to his trustees, upon trusts for the sale, conversion, and investment thereof respectively; and directed his trustees to accumulate the annual proceeds thereof, at compound interest, for fourteen years from his decease. He then declared that "the trust moneys to arise or be produced under the residuary devise and bequest thereinbefore contained which should be so invested, and the accumulations which should be so made as aforesaid, and the stocks, funds, and securities in or upon which the said trust moneys and accumulations respectively should be invested, should, on the expiration of the said space of fourteen years, be divided into as many equal shares as the number of them, his three sons, *Alexander Ross*, *Thomas Ross*, and *William Francis Ross*, and his daughters *Mary Ross* and *Margaret Ross*, who should be then living, or should be then dead having left issue of his, her, or their body, or respective bodies then living; and one of the said shares should be respectively allotted to each of such children, and the share which should be so respectively allotted to each of his said sons who should be then living should be in trust for him absolutely, and be assigned and disposed of accordingly." The testator then provided for the event of either of his sons or daughters being dead at the time of allotment, leaving issue, and disposed of his daughters' shares as follows: "And the share which should be so allotted to each of his said daughters who should be then living should be held upon trust, during her respective life, to pay and apply the annual produce

V.-C. W. 1871 *In re* Ross's Trusts.

thereof in such or the like manner for her respective separate use, with such powers of appointment, and giving receipts as therein particularly mentioned; and after the decease of such respective daughter, the share so respectively allotted to her as aforesaid should respectively remain and be in trust for" (the children or child of such respective daughters as in the will particularly declared); "and if there should be no such child, then after the decease of such respective daughter, and such failure of her issue, the share so respectively allotted to her as aforesaid should go over and be in trust for the person or persons who, under the statutes made for the distribution of the estates of intestates, would then be entitled thereto, in case he" (the testator) "was then to die possessed thereof and intestate; and to be divided between or among such persons, if more than one, in the proportions in which the same would be divisible by virtue of the same statutes." The testator appointed the trustees of his will his executors. He died on the 27th of November, 1819, and his will was duly proved (with a codicil) on the 15th of December following. He left the five children named in his will, and no more.

The residuary estate of the testator was duly converted by his trustees shortly after his death, and the produce thereof invested and accumulated for the period and in the manner mentioned in his will. At the end of that period the trust funds and accumulation were divided into five equal shares. Three were paid to *Alexander Ross*, the son, *Thomas Ross*, and *William Francis Ross* respectively; and the remaining two were invested by the trustees in their names in trust for *Mary Ross* and *Margaret Ross* respectively, and their respective children (if any). *Margaret Ross* died a spinster on the 8th of June, 1871.

At that time the share to which she was entitled for her life amounted (after certain deductions for trustees' costs payable thereout) to the aforesaid sum of £9000 15*s.* 11*d.* £3 per Cent. Consolidated Bank Annuities, which, in November, 1871, were duly transferred to the above stated account.

The state of the testator's family on the 8th June, 1871, will appear from the following pedigree:—

Alexander Ross = *Mary.*
[The Testator. Died Nov. 1819.] [Died 10th March, 1857.]

1. *Alexander Ross* = (1) *Miss Goderich.* [Three children; all died infants and unmarried.]
[Died in 1842.] = (2) *Mary Dumaresq.* [Died 1839.]

2. *Thomas Ross.* [Died, a bachelor, in 1855.]

3. *William Francis Ross* = *Jane.* [Died 1856.]

4. *Mary Ross.* [Died a spinster, 1859.]

5. *Margaret Ross.* [Died a spinster, June 8th, 1871.]

Frederic Dumaresq Ross [Died 1863.] = *M. A. Machlachlan.*

Margaret Mary Dumaresq Ross. [The infant Petitioner.]

Mary Dumaresq = *Fletcher.* [Petitioners.]

Georgina Emily Howard = *Child.* [Petitioners.]

William Ross [Died 1870.] = *Miss Earp.*

1. *William Henry Ross.* 2. *Francis Ross.* Respondents.

Emma Margaret = *James Selby.* Respondents.

Several children.

Thomas Ross. Respondent.

Grace [Died, 1870.] = *Ed. Selby.*

1. *Emma.* 2. *Alice Mary.* 3. *Francis James.* Respondents. 4. *Edmond Wallace.*

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The Petition dealt only with the share of *Margaret Ross*, which practically was now the whole of the testator's residuary estate. The question was, whether, inasmuch as the claimants were all children or grandchildren of *Alexander Ross*, the son, and *William Francis Ross* — *i. e.*, grandchildren or great-grandchildren of the testator—they took representatively and *per stirpes* under *Alexander Ross*, the son, and *William Francis Ross*, respectively or *per capita*?

Mr. *Greene*, Q.C., and Mr. *Millar*, for the Petitioners:—

According to the true construction of the *Statute of Distributions* (22 & 23 Car. 2, c. 10, ss. 3, 5, and 7), this fund must be divided into moieties, and each moiety subdivided among the descendants, 1, of *Alexander*, the one son, and, 2, of *William Francis*, the other son, of the testator. But as those descendants in each case consist now of both grandchildren and great-grandchildren of the testator—persons not all equally next of kin to him—they can only take as representatives of their respective parents and not in their own right as the next of kin—*i.e.*, they take *per stirpes* and not *per capita*: *Duvers* v. *Dewes* (1); *Williams* on Executors (2); *Lloyd* v. *Tench* (3). Both *Burton's* Compendium of Real Property (4) and *Watkins* on Descents (5) clearly contradict *Toller* on Executors (6). The result is, that the Petitioners who claim under *Alexander*, the son, will each take one-third of their moiety.

Mr. *Bedwell*, for the Respondents *W. H. Ross*, *Francis Ross*, *James Selby*, and *Emma Margaret*, his wife, and *Thomas Ross*, great-grandchildren and grandchildren of the testator, claiming under *William Francis Ross*:—

This case is a mixed one, where persons are entitled both *per stirpes* and *per capita*. If the claimants had been all grandchildren only, or all great-grandchildren only, the division of the fund would have been *per capita*—because all the claimants would

(1) 3 P. Wms. 49 (note D.).
(2) Vol. ii. Ed. 1867, pp. 1385–1386.
(3) 2 Ves. Sen. 213–216.
(4) 8th Ed. 1856, pp. 432–433 (note) 434, 435.
(5) Ed. 1837, p. 259.
(6) Ed. 1838, p. 374.

have been equally next of kin to the testator. The statute does not contemplate representation beyond "the children of an intestate, and such persons as legally represent such children, in case any of the said children be then dead" (sects. 3 and 5). That is to say, it looks at the possible death of the children, and the succession of their immediate descendants only, viz., the grandchildren of the intestate. This fund, therefore, ought now to be divided into sevenths—because, at the statutory limit of representation, there were seven grandchildren of the testator, each one entitled, as equally his next of kin, to take *per capita*. But their children, the great-grandchildren of the testator, can only take their parent's share, by representation, *i.e., per stirpes;* and the fund should be distributed accordingly. There is no reported case exactly like this one.

Mr. *Everitt*, for the Respondents, the other great-grandchildren claiming under *William Francis Ross*, supported the same view.

Mr. *Methold*, for the trustees.

Mr. *Greene*, in reply:—

The statute alone is to be regarded in this case, and it only alludes to next of kin in the 3rd and 6th sections. In the latter it says that "in case there be no children, nor any legal representatives of them, then one moiety of the estate is to be allotted to the wife, and the residue distributed equally to every of the next of kindred of the intestate who are in equal degree, and those who legally represent them." That clearly shews that as long as there are lineal descendants the division must be *per stirpes*, and not *per capita;* and the distribution of the fund contended for by the Petitioner is the correct one.

Dec. 21. Sir John Wickens, V.C.:—

The question reserved for judgment in this case is one as to the operation of the *Statute of Distributions*, where the intestate left grandchildren and great-grandchildren, but no children.

Alexander Ross, by his will, dated the 17th of November, 1819,

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gave one-fifth of his residuary estate to his daughter *Margaret Ross* for life, with remainder to her children; and in default, "in trust for the person or persons who, under the statutes made for the distribution of the estates of intestates, would then be entitled thereto, in case I were then to die possessed thereof and intestate; and to be divided between and among such persons, if more than one, in the proportions in which the same would be divisible by virtue of the same statutes."

Margaret Ross died on the 8th of June, 1871, unmarried.

The testator died in November, 1819, leaving five children, of whom *Margaret* was the youngest.

Of these the second and fourth died before 1871 without issue. *Alexander*, the eldest son, had three children, of whom two survived him in June, 1871; and one died before June, 1871, leaving a daughter still living. *William Francis*, the third son of the testator, and the only one besides *Alexander*, who left descendants living in 1871, had four children, viz., *William*, who died in December, 1870, leaving two children now living, *Emma* and *Thomas*, who are both still living, and *Grace*, who died in January, 1870, leaving four children, now living.

Therefore, in June, 1871, there were two subsisting lines of the testator's descendants; the one springing from *Alexander Ross* the younger, and represented by two grandchildren of the testator and one great-grandchild, the only child of a deceased grandchild; the other springing from *William Francis Ross*, and represented by two grandchildren of the testator, two great-grandchildren springing from his dead grandchild *William*, and four great-grandchildren springing from his dead grandchild *Grace*. The question on the Petition is as to the shares in which *Alexander Ross's* estate is to be distributed among those persons.

It is singular that a question of this sort should be uncovered by judicial authority; but no case bearing on it was cited at the Bar, and I have been unable to find any.

The *Statute of Distributions* deals separately with the case of descendants, and that of next of kin not descendants. The case of children is provided for by the 5th section (which is referred to in the 3rd), and the case of next of kin, not being descendants, by the 6th and 7th sections. The general effect of the provisions is,

that (supposing there to be no wife) the estate, in case there are descendants, shall go between the children and their representatives; and in case there are no descendants, shall go amongst the next of kin or their representatives; and that the division is *per capita* where all the takers claim in their own right; and *per stirpes* where they, or some of them, claim as representatives of another person.

It has been long settled that the word "representatives" in this Act includes only "descendants."

It has been further settled that where all the persons entitled to claim are collaterals equally near of kin, for instance, second cousins twice removed, they take *per capita*, because they all take in their own right; but that where there are no ancestors or descendants, and the nearest of kin are brothers and sisters, but there are also children of dead brothers and sisters, the latter, though not of the next of kin, may claim as representatives of the brother or sister from whom they spring, and may stand in the place of that brother or sister for the purpose of distribution; so that the distribution is *per stirpes*. This privilege is expressly limited by the statute, and does not extend to any more remote descendants of brothers and sisters than their children, and does not apply at all to any case where the next of kin are all more remote than brothers and sisters.

There are, therefore, two cases provided for by the statute, viz., 1, where there are children, or the representatives—*i. e.*, the descendants—of children; 2, where there are no descendants.

It is the former case alone that has to be dealt with here. Considering the question as one solely on the construction of the statute, it is difficult, I think, to resist the conclusion that, if there are descendants but no children living to share the estate, it is to be divided into as many shares as there are children who have left living descendants, and that the descendants of each such child are to take as representing the child, and, of course, only the child's share.

The *Statute of Distributions* was drawn by a civilian, Sir *Walter Walker* (1), and seems to have been intended to introduce the rules of the Roman civil law into this branch of English law. It is

(1) See *Rex* v. *Raines*, 1 Ld. Raym. 571–574.

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therefore, perhaps, not irrelevant to remark that the view of the construction of the statute which is taken above makes it conformable to the Roman law. It will be sufficient for this purpose to refer to the 118th Novell, and, as commentaries, to the Elements of *Heineccius* (1), and *Mühlenbruch's Doctrina Pandectarum* (2). Citations to the same effect might, I think, be multiplied to any extent.

The principal difficulty in the case is this: In *Toller* on Executors (which may almost be called the received text-book on the subject) a different opinion is expressed. [In the 7th edition, by *Whitmarsh* [1838], the passage is at p. 374.] Various authorities are cited for this, but none of them apply to the case of descendants. The dictum is transferred into *Williams* on Executors, where, in the 6th edition [1867], it occurs in p. 1385. But it appears to stand there on the authority of *Toller* alone, since the only cases cited are those cited by *Toller*, and irrelevant.

On the other hand, there is a remarkable passage in *Hargrave's* Jurisconsult Exercitations (3), in which, speaking of Dr. *Harris's* Justinian, he asserts what would seem to be the true construction of the statute; and a similar view is to be found in *Burton's* Compendium (4), which was, I believe, published about 1830, and has gone through numerous editions; and the true principle is stated in *Blackstone* and many other text-books, though the special distinction between descendants who can take only as children, or representatives of children, and next of kin who take in their own right, however remote, is not pointed out.

The text-books are not, strictly speaking, authorities on such a question; if, however, there had been an absolute consent among them on a point likely to be of such frequent occurrence, one would have hesitated to pronounce an opinion in opposition to what might seem to be an established course of distribution. But in the face of the passage from *Hargrave*, which has been often referred to, and of the statement in all the editions of a popular elementary work like *Burton*, it cannot be said that there has been such a consent.

Feeling, therefore, free to follow my own clear opinion on the

(1) Pl. DCCXLVI.
(2) Pl. 632.
(3) Pages 270–2.
(4) Pl. 1403.

construction of the statute, I hold that in this case the sum in question must be divided into moieties, of which one is divisible among the descendants of *Alexander Ross* the younger, and the other among the descendants of *William Francis Ross*; the division among each class being in each case *per stirpes*.

Solicitors: Messrs. *Rixon & Son*; Messrs. *Francis & Bosanquet*; Messrs. *Fielder & Co.*

In re CLINTON'S TRUST: HOLLWAY'S FUND. THE SAME: WEARE'S FUND.

Will—Devise of Real Estate—Tenant for Life—Reversionary Interest—Marriage Settlement—Covenant to Settle after Acquired Property—Conversion—"Entitled" in sense of "Entitled in Possession."

H. F. C., who died in 1852, by will gave real estates to trustees upon trusts for his wife for life, and, after her decease, for the benefit of his unmarried daughters. He gave power to the trustees after the decease of his wife, or the decease or marriage of all his daughters, or earlier, with the consent of his wife, or, if she should be dead, of his unmarried daughters, to sell the estates; and they were to invest the moneys and to pay the income to his wife for life, and, after her decease, to divide the principal moneys amongst such of his daughters as should be living at his decease, equally, as tenants in common. He left five daughters surviving. *L.*, one of them, in 1853 married *W.*, and *I.*, another of them, in 1858 married *H.* By the settlement made on the marriage of *I.* and *H.* she assigned to trustees certain trust funds and premises upon trusts during their joint lives to pay the income to her for her separate use, and, after the decease of either, to pay it to the survivor for life, and after the decease of the survivor upon trusts for the benefit of the children or remoter issue, as they should jointly appoint; and in default of such appointment, as the survivor should appoint; and in default, for the benefit of the children equally. The settlement contained a covenant by the husband and wife, that if, at any time after the marriage, and during their joint lives, they, or either of them in her right, should by gift, descent, succession, or otherwise, become entitled to any real or personal estate, property, or effects of the value of £100 or upwards, at any one time, the same should be conveyed, transferred, assured, and paid to the trustees upon the trusts declared. The testator's estates were, in 1867, with the consent of his widow, sold by the trustees, and they invested the proceeds in *East India Government Stock*. The widow died in April, 1871, leaving *I.* and *H.* surviving.

By the settlement made on the marriage of *L.* and *W.*, she assigned to trustees certain trust funds and personal estate upon trusts similar to those,

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and there was a covenant similar to that contained in the settlement of *I.* and *H.* *L.* died in January, 1865, without having concurred in exercising the joint power of appointment. *W.* died in January, 1871. By will he appointed the trust funds and personal estate settled by his late wife.

The trustees of *H. F. C.'s* will sold the stock, and paid into Court, to a credit in *I.* and *H.'s* matter, the sum of £2290 18*s.*; and *I.* and *H.*, by their Petition, prayed that it might be paid to *H.* The same trustees paid into Court, to a credit in *L.* and *W.'s* matter, a similar sum and some apportioned dividends; and the two surviving trustees of *L.* & *W.'s* settlement (who were also two of the trustees and executors of *W.'s* will), and the children of the marriage, by their Petition, prayed that it might be paid to the trustees of the settlement:—

Held, that "entitled" must be read "entitled in possession," and therefore that the fund in *I.* and *H.'s* matter was bound by the covenant, and must go to the trustees of the settlement, the required change in the property having taken place during the coverture; and that the fund in *L.* and *W.'s* matter was not bound by the covenant, and must go to *W.'s* legal personal representatives, there having been no change in the property during the coverture.

9 Ch 99.
18 Eq 441
2 Ch D 364
3 Ch D 769, 773
6 Ch D 621
13 Ch D 196

PETITIONS.

The first of these Petitions stated that *Henry Fynes Clinton* (who died on the 24th of October, 1852), by will dated the 29th of May, 1852, gave and devised certain freehold and copyhold hereditaments and premises, situate at *Welwyn*, unto two trustees, their heirs and assigns, upon trust to pay a life annuity (long since determined by the death of the annuitant), and subject thereto in trust for his wife and her assigns for life, and immediately after her decease upon trusts for the benefit of his unmarried daughters for the time being.

The testator declared that, after the decease of his wife, or the decease or marriage of all his daughters, or earlier, with the consent of his wife if living, or if she should be dead, with the consent of his unmarried daughters for the time being, the trustees for the time being should have power to sell the hereditaments and premises, and should invest the residue or surplus of the moneys arising from such sale in any of the securities therein specified, and should pay the interest, dividends, and annual produce thereof unto his wife and her assigns for life, and after her decease, should pay, transfer, and divide the principal moneys between and amongst his five daughters therein named, or such of them as should be living at his decease, in equal shares, as tenants in common, and

not as joint tenants, their executors, administrators, and assigns. The trustees were appointed executors of the will.

The testator left his five daughters him surviving.

Ida Fynes Clinton, afterwards *Ida Fynes Burroughes*, widow, and who, in July, 1858, intermarried with *James Hollway*, was one of such daughters; and *Louisa Emma Mary Fynes Clinton*, who, in August, 1853, intermarried with the Rev. *Thomas William Weare*, was another of such daughters.

By an indenture of settlement, dated the 7th of July, 1858, and made on the marriage of Mrs. *Burroughes* (formerly *Ida Fynes Clinton*) and Mr. *Hollway*, Mrs. *Burroughes* assigned unto three trustees, their executors, administrators, and assigns, certain trust funds and premises, not including the *Welwyn* estates, but including other property acquired under the will of the testator, upon trust during the joint lives of Mr. and Mrs. *Hollway*, to pay the income to her for her separate use, but not by way of anticipation; and after the decease of either Mr. or Mrs. *Hollway*, upon trust to pay the income unto the survivor during his or her life, and after the decease of such survivor, upon trust for such one or more of the children, or grandchildren, or other issue of Mr. and Mrs. *Hollway* as they should jointly appoint. And for default of such appointment, then, as the survivor should appoint, and for default of such appointment, in trust for all the children of the marriage, equally, as tenants in common.

The settlement contained the following covenant: "And the said *James Hollway* and *Ida Burroughes* do hereby jointly, for themselves, their heirs, executors, and administrators, and each of them doth hereby separately, for himself and herself, and his and her heirs, executors, and administrators, covenant with the said *C. J. Fynes Clinton*, *W. R. Baker*, and *J. G. Hollway*, their executors and administrators, that if at any time or times after the solemnization of the said intended marriage, and during the joint lives of the said *J. Hollway* and *Ida Burroughes*, they or either of them in her right, shall by gift, descent, succession, or otherwise howsoever, become entitled to any real or personal estate, property, or effects, of the value or to the amount of £100 and upwards, at any one time (other than and except any interest which shall be restricted to the life of the said *Ida Burroughes*, and

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settled or limited to her separate use and disposal, without power of anticipation), then and in every such case the same shall be forthwith, at the costs of the said trust estate, conveyed, transferred, assured, and paid to the trustees or trustee for the time being of these presents, upon the trusts herein declared concerning the said premises hereinbefore assured by the said *Ida Burroughes*, or such of them as shall be then subsisting or capable of taking effect, or as near thereto as the natures and qualities of the said properties respectively will admit of; and if such properties, or any of them, should consist of lands or hereditaments, then with such usual powers of leasing and selling and exchanging, and other ordinary provisions, as the trustees or trustee for the time being of these presents shall deem necessary or expedient."

There was issue of the marriage five children—all now infants and Respondents.

The freehold and copyhold hereditaments and premises at *Welwyn* were, with the consent of the testator's widow, sold in 1867, and the net proceeds of such sale were invested by the trustees in the purchase of £11,428 11*s.* 4*d.* £4 per Cent. *East India* Government Stock, and the dividends were duly paid to the testator's widow up to the day of her death, which occurred on the 25th of April, 1871.

On the 30th of October, 1871, the trustees of the will sold the stock; and after payment of legacy duty and certain costs, there remained a balance of £11,539 4*s.* 4*d.* cash, one-fifth part of which, (after deducting the costs of paying into Court) amounting to £2290 18*s.*, the trustees paid into Court to the credit of "In the Matter of the Trusts of the Share of the Proceeds of Sale of the *Welwyn* Estate bequeathed by the Will of *Henry Fynes Clinton* in favour of *Ida Fynes Clinton*."

The Petitioners, *James Hollway* and *Ida* his wife, prayed that, after the payment of the costs of the Petition, the residue of the sum of £2290 18*s.* might be paid to him.

The second Petition stated that by an indenture of settlement, dated the 22nd of August, 1853, and made on the marriage of *Louisa Emma Mary Fynes Clinton* with the Rev. *Thomas William Weare*, Miss *Clinton* assigned unto three trustees, their executors, administrators, and assigns, certain trust funds and personal estate,

upon trusts similar to those contained in the settlement of Mr. and Mrs. *Hollway* and set forth above; and the settlement of Mr. and Mrs. *Weare* contained the covenant set forth above within inverted commas.

There was issue of the marriage of Mr. and Mrs. *Weare* four children—all now infants.

Mrs. *Weare* died on the 11th of January, 1865, without having concurred in exercising the joint power of appointment reserved to her and her husband by the settlement.

Mr. *Weare*, who died on the 24th of February, 1871, by will, in April, 1866, appointed three executors, and appointed that all the trust funds and personal estate settled and assured by his late wife should, from and immediately after his decease, be applied, in the first place, in providing portions for his three daughters as therein mentioned, and subject thereto he appointed the same to his son if he should attain the age of twenty-one years, and his executors, administrators, and assigns, absolutely; and he gave and bequeathed all his personal estate whatsoever and wheresoever to his trustees (subject to the payment of his debts) upon trust to pay the income to *H. M.* for life, and after her decease, upon the same trusts as declared concerning certain hereditaments comprised in the settlement. Mr. *Weare*, by a codicil in August, 1867, appointed two other persons jointly with the three named in his will to be trustees and executors of his will.

The trustees of the will of *Henry Fynes Clinton* set apart another fifth of the said sum of £11,539 4*s.* 4*d.* cash, amounting (after deducting costs of paying in) to £2290 18*s.*, which sum, together with a sum of £39 12*s.* 11*d.*, apportioned dividends, making together £2330 10*s.* 11*d.*, they paid into Court to the credit of "In the Matter of the Trusts of the Share of the Proceeds of Sale of the *Welwyn* Estate bequeathed by the Will of *Henry Fynes Clinton* in favour of *Louisa Emma Mary Fynes Clinton*."

The Petitioners—the two surviving trustees of Mr. and Mrs. *Weare's* settlement of August, 1853 (who were also two of the trustees and executors of Mr. *Weare's* will), and the four children of Mr. and Mrs. *Weare*, by their next friend—prayed that, after the payment of costs, the residue of the sum standing to the credit of this account might be paid to the Petitioners, the two surviving trustees of the settlement.

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The tenant for life died in April, 1871.

Mr. *Hardy*, Q.C., and Mr. *Loughborough*, for Mr. and Mrs. *Hollway*, the Petitioners on the first Petition:—

The object of a marriage settlement is to make a certain provision for the wife and children.

As to all property which the parties are known to be entitled to, whether in possession or reversion, vested or contingent, it is reasonable to suppose they would, at the time of marriage, determine what particulars should, and what should not, be brought into settlement; and it is not consistent with the nature and objects of a settlement that it should be left to be determined by a number of collateral chances whether property which the wife is known to be entitled to should or should not become subject to the settlement.

Apart, then, from the particular circumstances of this case, it is a reasonable inference that in a well-drawn settlement, by which property of the wife is settled, the covenant as to future property is intended exclusively to apply to property not known of at the time, and to property not then acquired.

In this case all the terms of the covenant point to what is unknown, contingent, and future. "To become entitled" must mean entitled generally, whether in possession, reversion, or otherwise; it is universal; it does not mean "become entitled to the possession of" what the party was already entitled to in law, subject only to a life estate, or other intervening interest. Of course, if the intervening life interest had afterwards been conveyed to the wife, that would have been within the covenant; but the natural determination of the intervening interest gives no new right or title. To hold that "to become entitled" means "entitled to the possession of property," would be to narrow and restrict the covenant. But if the terms of the covenant leave the matter in doubt, the provisions of this settlement shew that it could not have been the intention of the parties that the fund in question should ever become subject to its provisions; for the settlement recites the testator's will, and actually settles property to which the wife was entitled under it; and with others, several reversionary interests.

Minute contingent interests are settled. The parties, therefore, were fully cognizant of the fund in question; they settled similar

particulars belonging to the wife, and the inference seems irresistible that they did not intend to bring this particular fund into settlement.

Further, the fund is money which has arisen from the sale of real estate. It could not have been affected by the covenant, during the coverture, unless the estate had been sold; nor, secondly, unless the mother had died; nor, thirdly, unless the fund had been actually received. Can it be imagined that the parties had these contingencies in view, and intended it should depend upon their happening whether the fund should or not be affected by the covenant?

The settlement must be construed like any other instrument, The Court will endeavour to find out what the intention of the parties was.

It must be admitted that the cases are not all reconcilable or satisfactory.

[They cited, on the general construction of the covenant, *Hoare* v. *Hornby* (1), *Otter* v. *Melvill* (2), *Atcherley* v. *Du Moulin* (3), *Wilton* v. *Colvin* (4), *Archer* v. *Kelly* (5), and *Dering* v. *Kynaston* (6); and, on the nature of the fund, *May* v. *Roper* (7) and *Briggs* v. *Chamberlain* (8).]

The case of *Franks* v. *Bollans* (9) having been mentioned by the Vice-Chancellor, it was stated that since the decision of the Lords Justices the case had, in view of an appeal to the House of Lords, been compromised.

Mr. *Higgins* (Mr. *Dickinson*, Q.C., with him), for the Respondents (the trustees of the settlement and the children of the marriage) on the first Petition:—

The property which has produced this fund is bound by the covenant. The words of the covenant are very large; they are—"gift, descent, succession, or otherwise howsoever become entitled

(1) 2 Y. & C. Ch. 121.
(2) 2 De G. & Sm. 257.
(3) 2 K. & J. 186.
(4) 3 Drew. 617. 2 Jur. N.S. 867
(5) 1 Dr. & Sm. 300. 6 Jur. N.S. 814
(6) Law Rep. 6 Eq. 210.
(7) 4 Sim. 360.
(8) 11 Hare, 69.
(9) Law Rep. 3 Ch. 717.

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to;" and they refer to "any real or personal estate, property, or effects."

In *Grafftey* v. *Humpage* (1) the words of the covenant were in case the lady or the husband, in her right, should at any time during the coverture succeed to the possession of or acquire any property real or personal, by devise, descent, bequest, or otherwise, and they were held to include a reversionary interest, which fell into possession during the coverture.

In *Blythe* v. *Granville* (2) two sums of stock of which the lady was possessed were settled upon certain trusts, and after a discussion upon the meaning of the words "become entitled," the Vice-Chancellor said that they meant "either in possession or in reversion," and held that the stock was bound by the covenant.

Ex parte Blake (3) was a stronger case in favour of the Petitioners than the present, and yet it was held that the property of the lady was bound by the covenant. There was in the present case a change of interest during the coverture which brought the fund within the words of futurity in the covenant, and so there was in *Maclurcan* v. *Lane* (4), where the word "accrue" was much observed upon.

In *Re Hughes' Trusts* (5) there was a covenant similar to that in *Grafftey* v. *Humpage*, for the words of it were, "gift, descent, succession, or otherwise become entitled to;" and it was held to include reversionary interests in consols.

In *Wilton* v. *Colvin* (6) the words of the covenant were in reference to the property of which the wife should, during the coverture, "become seised, possessed of, or entitled unto;" and it was held that the settlement contemplated future acquired title.

In *Otter* v. *Melvill* (7) the wife was absolutely and immediately entitled, at the date of the settlement, to the sum in question.

The case of *In re Browne's Will* (8) was one of tontine debentures, which were not reversionary, but in possession, and that was the ground of the decision. The Master of the Rolls said, "The

(1) 1 Beav. 46.
(2) 13 Sim. 190.
(3) 16 Beav. 463.
(4) 5 Jur. (N. S.) 56, 59.
(5) 4 Giff. 432.
(6) 3 Drew. 617.
(7) 2 De G. & Sm. 257.
(8) Law Rep. 7 Eq. 231.

lady was at that time both possessed of and entitled to this property;" and he afterwards added, that "if the parties to the settlement had intended to settle these tontine debentures, they would have done so by mentioning them in the settlement."

Hoare v. *Hornby* (1) was a case in which the words "all such further estate (if any) as shall, during the life" of the lady, "become vested in or accrue to her, or as shall or may be assignable," were used; and there it was held that the property was vested at the time of the settlement, and that it could not become vested. It is submitted that *Archer* v. *Kelly* (2), relied upon on the part of the Petitioners, is an authority in the Respondent's favour; for there the wife's interest was changed in condition during the coverture, and here the property was converted during the coverture. It was changed in its condition from being a mere reversionary interest into money in possession, and therefore upon that authority it is bound by the covenant. The word "succession" in this covenant may be relied upon, and if alone, it would be quite sufficient to give the Respondents this fund. The plain meaning of all the words shews that the Petitioners interest in this reversionary realty, which became during their coverture reversionary personalty, was intended to be bound, and therefore it is submitted that it ought to be paid to the trustees of the settlement.

Mr. *Hardy*, in reply:—

Mr. *Higgins* (Mr. *Dickinson*, Q.C., with him), for the Petitioners (the two surviving trustees of Mr. and Mrs. *Weare's* settlement, and the four infant children of the marriage,) on the second Petition:—

Re Hughes' Trusts (3), in which *Grafftey* v. *Humpage* (4) was followed, is a clear authority in favour of these Petitioners. The covenant here refers to the future acquisition of title, and, assuming that the Court will take that view of the matter, it will be needless to carry the argument further.

Mr. *Hardy*, Q.C., and Mr. *Loughborough*, for the Respondents

(1) 2 Y. & C. Ch. 121.
(2) 1 Dr. & Sm. 309.
(3) 4 Giff. 432.
(4) 1 Beav. 46; 3 Jur. 622.

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(the legal personal representatives of Mr. *Weare*) on the second Petition :—

Grafftey v. *Humpage* (1) has been disapproved of by Vice-Chancellor Knight *Bruce* in *Hoare* v. *Hornby* (2), by Vice-Chancellor *Kindersley* in *Wilton* v. *Colvin* (3), and by the present Lord Chancellor in *Atcherley* v. *Du Moulin* (4), *In re Wyndham's Trusts* (5), and *Rose* v. *Cornish* (6).

Re Hughes' Trusts (7) was an extraordinary decision if the report be correct; but the marginal note is clearly wrong.

In re Pedder's Settlement Trusts (8), decided by the Lord Justice *James* when Vice-Chancellor, is conclusive.

Mr. *Higgins*, in reply, submitted that upon a general view of the law the current of authority was with these Petitioners; but he admitted that the decision in *In re Pedder's Settlement Trusts* was against them. He relied upon the decision in *Re Hughes' Trusts*, and referred to *Atcherley* v. *Du Moulin*, where the words were "be or become entitled" during the coverture; *In re Wyndham's Trusts*; *Rose* v. *Cornish*, where the decision in *Grafftey* v. *Humpage* was followed; and *Churchill* v. *Shepherd* (9).

Mr. *Reginald Hughes* appeared for the trustees of the testator's will.

SIR JOHN WICKENS, V.C.:—

The law on this subject is in a very embarrassing state, and the decisions are in fact irreconcilable. I have on these two Petitions to deal with covenants which are in the same words, and which have been introduced into two different marriage settlements. What makes the case somewhat important is, that the covenants are in the usual form of conveyancers' precedents, and this form of words may be taken as likely to occur again.

(1) 1 Beav. 46; 3 Jur. 622.
(2) 2 Y. & C. Ch. 121, 123.
(3) 3 Drew. 624.
(4) 2 K. & J. 192.
(5) Law Rep. 1 Eq. 290, 293.
(6) 16 L. T. (N. S.) 786.
(7) 4 Giff. 432.
(8) Law Rep. 10 Eq. 585.
(9) 33 Beav. 107.

It must be taken as clear on principle and authority, that such a covenant, where the words are future, does not affect present property. The judgment of the Vice-Chancellor *James*, in the case of *In re Pedder's Settlement Trusts*, (1) represents, I conceive, quite accurately the law as deduced from the cases cited before him. There can be no doubt that a covenant like the present applies exclusively to interests which the parties may acquire a title to after marriage, distinct from those vested in them at the time of marriage, and that there must be some change or other in the title to the property after marriage in order to bring it within the covenant. This change is described in the covenant by the words "become entitled to."

The expression "become entitled to" in these and most covenants of the sort applies, I conceive, only to an acquisition of interest by the wife, and this may mean an acquisition of property in which the wife had no interest at the time of marriage, and which vests in her absolutely during the coverture—or an acquisition of property which she was entitled to in remainder at the time of marriage, and which vests in possession during the coverture—or an acquisition of property in which she had no interest at the time of the marriage, which vests in her by way of future title during the coverture, but does not vest in possession till it is determined. There can be no doubt that the first of these three classes is within the covenant; the difficulty arises with regard to the other two classes. Both of them cannot be included in such a covenant, and the question is, which of them is, *primâ facie*, to be considered as so included. Now it seems to me, that in considering this question we start with some slight presumption that the object of a settlement being to exclude the marital right, it is more likely, and the Court will be inclined to hold that it was intended to affect property which comes into possession during coverture, and which, therefore, the husband may make his own; but that does not carry us very far. Then the nature of these settlements is to be considered. Each of them is an ordinary marriage settlement of the wife's property—that is to say, the income during the joint lives of the husband and wife is to be the wife's separate and inalienable property; it is then

(1) Law Rep. 10 Eq. 585.

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to go to the survivor for life; and there follow trusts for the children and remoter issue, as the husband and wife, or the survivor, may appoint; and in default for the children as tenants in common. Now, of course, these trusts, like all trusts in a marriage settlement, point to a limited period, and they must naturally be worked out during a certain time. If the wife during coverture should become entitled to a future interest, subject to a life estate or life estates, and such future interest be held to be included in the settlement, it might prolong the trusts till long after the youngest child's majority. There is no provision in the settlement for the sale of such a future interest; but there are some provisions which, by implication, negative the presumption that it was intended to be sold.

Then it is to be observed, as regards both covenants, that the property to be acquired is to be "of the value" of £100 or upwards. That seems to me to mean the actual value, and not the estimated value of a remainder acquired during coverture, and not falling into possession till many years afterwards. All this points to a presumption that property falling into possession was intended to be included in such a covenant; but it is not to be denied that the effect of this remark is considerably diminished by what was said in the case of *In re Mackenzie's Settlement* (1).

Moreover the covenant goes on to say that when the title accrues the property is to be forthwith "conveyed, transferred, assured, and paid to the trustees or trustee for the time being." The second and fourth of these words point to possession only. "Assured" is equally applicable to present and future interests. Is it not a fair inference that all these words refer to the handing over of an interest in possession? Again, it is to be held, when handed over, upon the trusts "then subsisting or capable of taking effect." Are not these words strictly applicable to an interest in possession only, and not to a remainder in a money fund to take effect after a certain number of perhaps young lives? If assigned, the moment the title in remainder accrues, it could only be applied to the trusts then subsisting by means of a sale, which, as I said before, was not contemplated. The word "succession" in these particular covenants seems rather to support the same view.

(1) Law Rep. 2 Ch. 345.

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Putting authorities out of the question, and being obliged to elect between the two interpretations I have mentioned, I cannot, on the covenant standing alone, doubt that the word "entitled" must be read "entitled in possession," which, I am inclined to think, is the natural interpretation.

With regard to the authorities, though I do not propose to go through them, yet I think I must say that the decision in *James* v. *Durant* (1) cannot be reconciled with the more recent cases of unimpeachable authority. *Grafftey* v. *Humpage* (2) is a peculiar case, and is only to be followed where the question is specifically the same. *Blythe* v. *Granville* (3) is clearly, I think, in accordance with the view I take of this case, and having been approved of by Vice-Chancellor *Kindersley*, Vice-Chancellor *Stuart*, and the Master of the Rolls, it is not lightly to be departed from. Nor do I understand that Vice-Chancellor *Knight Bruce*, in the case of *Hoare* v. *Hornby* (4), intended to dissent from the decision in *Blythe* v. *Granville* as distinguished from some of the *dicta* in that case. *Spring* v. *Pride* (5) is also in accordance with the view I have taken, though the words there are different; and *Archer* v. *Kelly* (6) seems to be another authority in the same sense. In *In re Mackenzie's Settlement* there are these very large words, "now is, or" . . . "shall become entitled" in any way whatever; and these words were, no doubt, sufficient to justify the Lords Justices in holding that they included vested interests in remainder.

The result is as follows: With regard to the first Petition, I hold that the change required during the coverture to bring this money into the settlement took place by the reversion vesting in possession; and that the covenant binds it. As to the Petition in reference to *Weare's* Fund, I cannot see that there was any change at all in the property during the coverture; and I could not hold it bound by the covenant without dissenting from a long string of authorities.

At the same time, I am bound to say that, in arriving at this latter conclusion, I am taking a different view from that taken in

(1) 2 Beav. 177.
(2) 1 Beav. 46; 3 Jur. 622.
(3) 13 Sim. 190.
(4) 2 Y. & C. Ch. 121.
(5) 10 Jur. (N. S.) 646.
(6) 1 Dr. & Sm. 300.

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Re Hughes' Trusts (1), and from that of the present Lord Chancellor in *Rose* v. *Cornish* (2); but the grounds upon which those decisions were put seem to have been cut away by subsequent cases.

Therefore, on the first Petition the fund will go to the trustees of the settlement, and on the second Petition it will go to the legal personal representatives of Mr. *Weare*.

Solicitors: Messrs. *Loughborough & Son*.

(1) 4 Giff. 432. (2) 16 L. T. (N.S.) 786.

Ex parte STURT & CO.

In re PEARCY.

C. J. B.
1871
Dec. 18.

Bankruptcy Act, 1869, s. 6—*Petitioning Creditor's Debt*—"*Liquidated Sum due at Law or in Equity.*

The petitioning creditor's debt must be a debt on which an action can be brought, and the word "due" in sect. 6 means "presently payable."

Therefore, where *S. & Co.* supplied goods to *P.* on a two months' credit to the amount of £117, of which amount, at the date of the presentation of the petition, only £49 odd was actually payable by *P.* to *S. & Co.*:—

Held, that the debt was not sufficient to support the petition for adjudication.

8 Ch. 377
9 Ch 386-8
18 Q B D 378
2 Ch D 102

THIS was an appeal from an order of the County Court Judge at *Lewes*, dated the 5th of December, 1871, dismissing a petition by Messrs. *Sturt & Co.* praying that *Pearcy* might be adjudicated a bankrupt, on the ground that the debt due to the petitioning creditors was not sufficient to support a petition in bankruptcy.

Messrs. *Sturt & Co.* were in the habit of supplying goods to *Pearcy* on a two months' credit, and being informed that *Pearcy* had executed a bill of sale of all his household property and stock in trade to one of his creditors to secure £380, they, on the 14th of November, presented their petition, alleging the bill of sale as the act of bankruptcy. At that date the sum due and actually payable by *Pearcy* to Messrs. *Sturt* amounted only to £49 12*s.* 11*d.*, although goods to the value of £117 had been supplied at the usual two months' credit by Messrs. *Sturt*.

Mr. *De Gex*, Q.C., and Mr. *Brough*, for the Appellants, Messrs. *Sturt*:—

The point is whether, in sect. 6, the word "due" means due and immediately payable. We submit it does not; a debt may be *debitum in præsenti solvendum in futuro* (1). The words of sect. 6 do not shew that "due" means "presently payable." Under sect. 31 all debts, "present or future," may be proved under the bankruptcy; and sects. 32 and 39, and *Robson* on Bankruptcy (2),

(1) Coke upon Litt. 292, b. (2) Page 138.

C. J. B. 1871 *Ex parte* Sturt & Co. *In re* Pearcy.

support our view. It is true that sect. 91 of the *Bankrupt Law Consolidation Act*, 1849, is not re-enacted; but the mere omission of the words used in that section does not prove that the Legislature meant to change the rule. Great inconvenience would result if the decision of the County Court Judge should be upheld, as it would be unsafe to transact any business on a credit system; the creditor would see the debtor disposing of all his property, and, because his debt was not immediately payable, would be powerless to stop the proceeding. In *Mitchell's Case* (1) Lord Justice *Giffard* stated his definition of the meaning of the word "due" as follows: "It is a very comprehensive term, and to my mind it does not mean a debt payable at the moment, but a debt which existed at the date of the deed, and is therefore proveable under it."

Mr. *Winslow*, for *Pearcy*, the Respondent:—

The Legislature has omitted the clause in sect. 91 of the Bankruptcy Act, 1849, and although in sect. 31 all debts present or future may be proved under the bankruptcy, it does not therefore follow that the Legislature intended that future debts should be sufficient to support a petition in bankruptcy. In *Ex parte Mackerness* (2) a commission in bankruptcy, which was sued out partly on a debt not then actually payable, was set aside; and a similar decision was given in *Ex parte James* (3). Then by 5 Geo. 2, c. 30, s. 22, a creditor on a bond was enabled to sue out a commission, and 6 Geo. 4, c. 16, s. 15, extended the power. If, then, the Legislature had intended the law to be as contended for by the other side, clear words would have been used.

[He was here stopped by the Court.]

Mr. *Little*, Q.C., appeared for the bill of sale holder, but took no part in the argument.

Mr. *De Gex*, in reply.

Sir James Bacon, C.J.:—

My view is that a debt due means a debt of which payment can be enforced. Former Acts of Parliament relating to bankruptcy

(1) Law Rep. 5 Ch. 400, 403. (2) 1 P. Wms. 260. (3) 1 P. Wms. 610.

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are mere matters of history, and are swept entirely away by the present Act; and it is my duty to determine by it, and by it alone, all questions which may be brought before me in this Court. In sub-sect. 6 of sect. 6 "a sum due" means presently payable; and in the same section the Act says: "the debt of the petitioning creditor must be a liquidated sum due at law or in equity;" and I cannot put two different interpretations on the same word in the same section of the Act. I consequently hold that a debt payable at a future date is not a debt due at law or in equity, on which a petition for adjudication can be founded.

Solicitors: Mr. *W. Sturt;* Messrs. *Phelps & Sidgwick*, agents for Mr. *Holman, Lewes.*

Ex parte TAIT. *In re* TAIT & CO.

C. J. B.
1872
Jan. 15.

Bankruptcy Act, 1869, *sect.* 72—*Jurisdiction—Injunction—Inspectorship Deed.*

Where an inspectorship deed has been duly executed under the provisions of the *Bankruptcy Act*, 1861, the Court has power to restrain a creditor under the deed from continuing an action against the debtor in *Ireland*.

The right to restrain such a creditor is a right against him personally, because he sues in respect of a claim enforceable under a deed.

20 L.T. 736
10 Ch.D. 685

THIS was an application by Sir *Peter Tait* to restrain Mr. *Patrick Lynch*, one of his creditors, from continuing proceedings commenced by him in the Court of Exchequer in *Ireland* for the recovery of £1701 4*s.* 4*d.* under the following circumstances:—

The firm of *Tait & Co.*, of which Sir *P. Tait* was a partner, carried on the business of army contractors, and were also the owners of a line of steamers running between *England*, *Belgium*, *Brazil*, and the *River Plate*, and employed Mr. *Patrick Lynch*, who lived in *Limerick* and carried on the business there of an hotel-keeper, as marine superintendent of the line of steamers. The firm of *Tait & Co.* executed a deed of inspectorship on the 23rd of December, 1869, which was duly registered on the 31st of the same month, and at the date of that deed the firm was indebted to *Lynch* in the sum of £698 4*s.* 4*d.* for arrears of salary

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as superintendent, and Sir *Peter Tait* was also separately indebted to him in the sum of £1548 for hotel and private expenses, against which two sums there was a set-off of £545 for moneys advanced to *Lynch* by Sir *P. Tait* since the date of the deed of inspection.

Lynch sent in a claim under the deed for £698 4*s.* 4*d.*, which was rejected by the inspectors, and *Lynch* thereupon brought the action in the Court of Exchequer in *Ireland* against Sir *Peter Tait* to recover the sum of £1701 4*s.* 4*d.*, which sum was made up partly of the debt due to him from the firm of *Tait & Co.* as marine superintendent, and partly of the private debt due to him from Sir *Peter Tait.* The separate estate of Sir *Peter Tait* was also being administered under the deed of inspection; Sir *Peter Tait* was also a member of another firm, consisting of himself and *R. T. Tait* and *W. Abraham,* which had brought an action against *Lynch* for £450 in respect of moneys due on transactions which had taken place between the parties since the date of the inspectorship deed.

The Hon. *A. H. Thesiger,* for Sir *Peter Tait*:—

Under sect. 72 the Court has jurisdiction to grant this injunction: *Ex parte Rumboll* (1); *Ex parte Anderson* (2); and the Court has jurisdiction over a creditor who has claimed under a bankruptcy: *Ex parte Flower* (3). This is a case where the convenience of all parties will be best advanced by all questions being decided in this Court.

Mr. *Little,* Q.C., and Mr. *Cohen,* for the inspectors.

Mr. *Bagley,* for *Lynch*:—

It is doubtful whether the Court has jurisdiction to restrain an action in *Ireland;* but if it has it will not in such a case as this exercise such jurisdiction, as the debt was incurred in *Ireland,* and all the evidence and proofs of it are still there; and there is no evidence before the Court to shew how far the action has gone.

(1) Law Rep. 6 Ch. 842. (2) Law Rep. 5 Ch. 473.
(3) De G. 503.

SIR JAMES BACON, C.J.:—

I think I am bound to entertain this application as it stands. The first question arising is, whether I have jurisdiction, and upon that I do not entertain any doubt. The deed was executed under the statute of 1861, the operation of which is not suspended, and under which proceedings taken are transferred to the jurisdiction of this Court. That being so, every question that can arise under or in relation to that deed is, by effect of the 72nd section, brought within and subjected to the jurisdiction of this Court. That being so, it appears that a person named *Lynch* is bringing an action in respect of a claim which he might have made under the deed, for he does not pretend that any debt has been contracted since the execution of the deed. He had made a claim for £698, but that was rejected a long time ago; and having no further right here of action or cause of action, he sued one of the debtors, and inasmuch as he sues in *Ireland*, it is suggested that I can have no jurisdiction to restrain proceedings in *Ireland*. The right I have to restrain is a right against *Lynch* personally, because he has claimed under this deed and sues in respect of a claim under this deed; and whatever may be the nature of the claim said to exist, it is clear that he claims to be a creditor under the deed. The question between the parties is one that must be decided here. If I were here reduced, which I am not, to consider the question of greater or less convenience, I should say that it would be more convenient for the inquiry to take place in this Court than in *Ireland*, and that no advantage whatever would be derived by the Plaintiff by reason of prosecuting his action in *Ireland*, which he could not obtain by reason of the matters in dispute being disposed of here. I do not mean in any degree to decide upon the merits of this case. I only decide upon the affidavits in support of the motion, as well as the affidavit in reply, that there is enough evidence, I think, not only to justify, but to render it absolutely necessary that I should restrain any proceeding in the action which *Lynch* has brought in *Ireland*. I think it would be fair also in this state of things that I should exact an undertaking from Mr. *Thesiger's* client that he will not proceed with the action against *Lynch* until further order.

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Mr. *Thesiger*:—Your Honour will allow leave to apply.

THE CHIEF JUDGE:—Yes. All questions of costs will be reserved, and the effect of this order will be merely to transfer the question in dispute from the Court in *Ireland* in which it is pending to this Court.

Solicitors: Messrs. *Linklater & Co.*; Messrs. *Simpson & Cullingford*.

C. J. P. 1871 *Nov.* 6, 13.

Ex parte BAILEY. *In re* JECKS.

Bankruptcy Act, 1869, *s.* 87—*Execution Creditor—Trustee—Trader.*

An execution creditor who has seized the goods of his debtor before the latter has committed an act of bankruptcy is entitled to the proceeds of them as against the trustee. Therefore where goods of a non-trading debtor were seized on the 18th of February, and the debtor filed a petition for liquidation on the 22nd of February:—

Held, that the execution creditor was entitled to the proceeds of the execution.

The *Bankruptcy Act*, 1869, has no retrospective operation, and where it speaks of traders, it means such persons only as were traders at the time when it first came into operation.

Therefore where a person had ceased to trade in 1868, but in 1871 owed various debts contracted during the period he was in trade:—

Held, that he was not a trader within the meaning of the *Bankruptcy Act*, 1869.

THIS was an appeal from an order of the County Court Judge of *Norwich*, dated the 2nd of June, 1871, by which an application by Mr. *Elijah Crozier Bailey*, as the trustee of the estate of *Roger Allday Kerrison* and *Roger Kerrison*, who were partners in *Harvey & Hudson's* bank, at *Norwich*, to vary or rescind a previous order made on the 6th of April, and for a declaration that notwithstanding such order the sheriff might be at liberty to proceed with the sale under the execution, or that the proceeds of the goods, if sold, might be applied in payment of the execution creditor's debt, was dismissed with costs.

Mr. *Bailey* obtained judgment against *Jecks* for £4173 13*s.* 8*d.*,

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and on the 18th of February, 1871, a writ of execution was issued and delivered to the sheriff of *Norfolk*, who seized the goods of *Jecks* on the same day. On the 22nd of February *Jecks* filed a petition for liquidation under sect. 125, and on the same day a receiver was appointed, and an interim injunction was granted until the 28th of February, on the application of *Jecks'* solicitor, to restrain Mr. *Bailey* and the sheriff from proceeding further in the action and execution. Various proceedings, by adjournment, took place before the Registrar until the 6th of April (trustees having been appointed under the liquidation on the 20th of March), when the County Court Judge, on the application of *Jecks'* solicitor, made the injunction against Mr. *Bailey* and the sheriff perpetual in consideration of the trustees of the estate of *Jecks* agreeing to pay the sum of £25 in discharge of the sheriff's poundage, officers' fees, and charges for possession. On the 2nd of June the order appealed against was made by the County Court on the ground that the order of the 6th of April was drawn up with the consent of all parties.

It appeared from the evidence that *Jecks* had formerly carried on business as a timber merchant, but had retired from business in April, 1868, and that a portion of the debt due to Mr. *Bailey* had been contracted by *Jecks* while in trade. Mr. *Coaks*, who was the attorney for Mr. *Bailey*, was also under-sheriff for *Norfolk*, and stated in his affidavit that he accepted payment of £25 simply in his character of under-sheriff, and that he did not, by so doing, intend in the slightest degree to prejudice the rights of Mr. *Bailey* under the execution. It appeared, however, that after the order of the 6th of April the sheriff withdrew from possession, and up to the 19th of May the trustees sold various portions of the goods without any objection being made by Mr. *Bailey*, who, it was alleged, must have known of the sales, as they were widely advertised in all the local papers.

Mr. *Reed*, and Mr. *Cozens-Hardy*, for Mr. *Bailey*:—

The acceptance of the £25 by Mr. *Coaks*, in his character of under-sheriff, cannot affect the rights of the execution creditor, and we deny that the order was made by consent. As the seizure preceded the act of bankruptcy, we are entitled as against the

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trustee: *Slater* v. *Pinder* (1); *Ex parte Rocke* (2). At the time the *Bankruptcy Act* came into operation *Jecks* had ceased to be a trader, and the Act is not retrospective: *Ex parte Craven* (3). If the Court should be of opinion that *Jecks* is to be considered a trader, sect. 87 (4) would not apply, as there has been no sale.

[They also referred to *In re Plas-yn-Mhows Coal Company* (5), and to sect. 15, sub-sect. 5, of the *Bankruptcy Act*, 1869.]

Mr. *Roxburgh*, Q.C., and Mr. *Finlay Knight*, for the Respondents, the trustees of *Jecks*' estate:—

The order of the 6th of April was clearly made by consent, as *Slater* v. *Pinder* was not decided until the 3rd of May, and the order was in accordance with the law as it then was: *Ex parte Veness* (6).

Part of the execution creditor's debt was a trade debt, and therefore *Jecks* must be held to be a trader: *Bailey* v. *Grant* (7); and sect. 87 of the Act of 1869 will apply even if there has been no sale.

Sir James Bacon, C.J., after stating the facts as above set out, continued:—

The application made to the County Court Judge on the 2nd of June was made mainly upon the authority of a case then recently decided in the Court of Exchequer, *Slater* v. *Pinder*, in which it was held that an execution creditor on a judgment

(1) Law Rep. 6 Ex. 228.
(2) Law Rep. 6 Ch. 795.
(3) Law Rep. 10 Eq. 648, 657.
(4) The 87th section is as follows:—
"Where the goods of any trader have been taken in execution in respect of a judgment for a sum exceeding £50 and sold, the sheriff, or in the case of a sale under the direction of the County Court, the high bailiff, or other officer of the County Court, shall retain the proceeds of such sale in his hands for a period of fourteen days, and upon notice being served on him within that period of a bankruptcy petition having been presented against such trader, shall hold the proceeds of such sale, after deducting expenses, on trust to pay the same to the trustee; but if no notice of such petition having been presented be served on him within such period of fourteen days, or if, such notice having been served, the trader against whom the petition has been presented is not adjudged a bankrupt on such petition, or on any other petition of which the sheriff, high bailiff, or other officer has notice, he may deal with the proceeds of such sale in the same manner as he would have done had no notice of the presentation of a bankruptcy petition been served on him."
(5) Law Rep. 4 Eq. 689.
(6) Law Rep. 10 Eq. 419.
(7) 9 Bing. 121.

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for less than £50, who had seized in execution the goods of his debtor, before the commission of an act of bankruptcy by the latter, was entitled to the proceeds of the execution against the trustee, although the adjudication was prior to the sale. On the part of the trustees it was insisted that whatever might be the law as pronounced by the authority referred to, the order of the 6th of April could not be disturbed, inasmuch as it proceeded upon a settlement or compromise of all matters then in dispute between the execution creditor and the trustees, and had been made upon the payment of £25, by which the creditor was relieved of all the expenses attending the sheriff's possession which he would otherwise have had to bear. It was further insisted by the trustees that, inasmuch as part of the debt for which the judgment had been recovered, and many other debts still owing by the debtor, had been contracted while he was in trade, the creditor was precluded by the 87th section of the *Bankruptcy Act* from all benefit of his execution. To this latter objection the execution creditor replied that the debtor had wholly ceased to be a trader from the month of April, 1868, that the 87th section of the Act had no retrospective operation, and, moreover, that no sale had taken place so as to bring it within the words of that section; and several affidavits on both sides were filed and used upon this occasion. The learned Judge was of opinion that the compromise upon which the order of the 6th of April was made, was full and effectual, and that it prevented him from entering upon a consideration of any of the other facts of the case, and his judgment was delivered in these terms:—

"I at first thought of reserving my decision for the purpose of referring to the law on the subject, and the practice and decisions on one or two points in the case; but after having heard both the learned gentlemen, and looking at the facts of this case and the sections of the statute relating to it, I find that it is an application under sect. 71 of the new *Bankruptcy Act* really to ask me, sitting in bankruptcy, to review or vary the order made on the 6th day of April last, which was an order made with the full knowledge and consent of all the parties upon the state of facts then existing. Much has been said by the gentlemen on both sides as to the question of the bankrupt being a trader or non-trader; but I do not think the question of trading or non-trading comes before me

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to offer any opinion. The real point appears to me to be the withdrawal of the sheriff. At that time the law was exceedingly doubtful as to whether the filing of the petition of arrangement by Mr. *Jecks* altogether defeated the execution and seizure by Mr. *Bailey;* and Mr. *Bailey*, acting as he was for a large body of very jealous creditors, took the opportunity of consulting one of the most able legal advisers he could, who happened to be also the under-sheriff, and who, in order to save the estate of *Harveys & Hudsons* the probable costs and expenses attending the seizure, willingly consented to withdraw, taking the sum of £25 in discharge of sheriff's poundage and other expenses, by which the estate of *Harveys & Hudsons* was exonerated from all liabilities in reference to the execution; and an order was prepared carrying this agreement into effect. That order being completed with the knowledge and consent of all competent parties, and a sum of money being accepted by the sheriff—accepted in point of fact by the execution creditor, in discharge of the sheriff's poundage, officers' fees, and charges of possession—it cannot now be varied or altered on the application of one of the parties to it; and I am of opinion that no case has been made out to induce me to interfere with it. I must, therefore, decide against the application."

The motion was therefore refused with costs on the 2nd of June, and it is against that order that the present appeal has been brought. The same facts, and arguments similar to those which were addressed to the learned Judge, have been brought to my attention; and with one very important addition of which he had not the benefit—I mean the recent decision of the Lord Chancellor in *Ex parte Rocke* (1)—the materials for deciding the questions between the parties are the same. I had decided in the last-mentioned case that the seizure by an execution creditor which had not been completed by sale before the title of trustee had accrued could not prevail against that title, but that the goods seized in execution belonged to the trustee, to be administered by him for the general benefit of the creditors. I had arrived at that conclusion after the best consideration that I could give to all the provisions, and to what I considered to be the scope and meaning of the statute—not without a full recollection that sect. 184 of the

(1) Law Rep. 6 Ch. 795.

Act of 1849 had, with other sections of the former statutes in bankruptcy, been repealed, but with the full conviction that it was the intention of the Legislature that the wholesome provisions of that section should still remain in force, and that the enactments of the existing statute would supply the place of the repealed clause, and that no intention was expressed in nor could be inferred from the enactments that it was the object of the Legislature to abrogate in effect one of the most important rules which had been established for the protection of the general creditors, which rule had been in beneficial operation since the statute of 1849 (which contains the sect. 184) was passed, and which had made the English law in bankruptcy in accordance with the principles of bankrupt law in other countries. As I have expressed my conviction and the reasons by which it was arrived at in the previous cases, it is unnecessary to repeat them. And, indeed, I feel it would be improper to say any more on this subject, since it has been decided by authority by which I am not only bound, but to which I most sincerely defer, that the law is different from that which I had taken it to be. The case of *Slater* v. *Pinder* (1) was decided on a special case. It was first heard before Baron *Martin* and Baron *Bramwell*. The question, which was the same as that which arose in this case, was thought so new and important that those eminent Judges directed it to be reheard before the whole Court. Upon the rehearing, which took place before the Chief Baron and the Barons *Martin*, *Channell*, *Cleasby*, Mr. Baron *Martin* read a judgment which he had prepared after the first hearing, in which he stated largely the grounds of his decision. That decision was, that the trustee was entitled only to the proceeds of the execution remaining after satisfying the execution. The other learned Barons also delivered separate judgments after hearing the second argument, in which they all concurred in deciding that inasmuch as sect. 184 of the Act of 1849 had been repealed and not re-enacted, an execution levied by seizure before an act of bankruptcy being valid at common law and not being affected by any statutory enactment, required no statutory or other protection, but remained effectual, although adjudication in bankruptcy might occur before the sale. That

(1) Law Rep. 6 Ex. 228.

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case was not before me when I decided in *Ex parte Rocke* (1) that an execution creditor who had seized, but had not sold, the goods of his debtor before the presentation of a petition for liquidation, and who was restrained from proceeding, was not entitled to the proceeds of the sale as against the trustee. From that decision an appeal was brought and argued before the Lord Chancellor and Lords Justices, who adopted the judgment of the Court of Exchequer, noticing the difference between the Act of 1849, which contained sect. 184, and the statute now in operation, which contained no such provision, and the order appealed from was accordingly, and for that reason, reversed.

Such, then, being the state of the law as established by the decisions I have referred to, it appears clear that the order now appealed from is not in accordance with the law so established. The learned County Court Judge pronounced no opinion on that point of law, but being of opinion that the creditor was bound by the compromise which had been entered into, and the payment of £25 by the trustee on the footing of that compromise, it was not to be disturbed on the grounds which had been submitted to him. Now, having considered the affidavits, and attending particularly to those which relate to this part of the case, and to the circumstances which were then in the contemplation of the parties, and it being, I think, clear that the consent of the creditor to the sheriff's withdrawing was made upon a misapprehension of the true effect of the statute, I cannot say that the other grounds upon which the Court was asked to vary or rescind the order of the 6th of April were to be disregarded. The order was not drawn up, nor is it expressed to be, by consent. It is positively stated by the creditor's solicitor (who was also the under-sheriff) that in demanding payment of the sheriff's poundage and fees, and in accepting the sum which was paid, he did so without prejudice to the rights of the execution creditor; and although the trustees say that this was not their understanding, I do not find that the statement of the creditor's solicitor is effectually contradicted, and I think it would be too much to say that the order of the 6th of April is one which cannot or ought not to be reconsidered.

(1) Decided on April 17; 25 L. T. (N. S.) 287.

Then as to the point of the debt or some part of it having been contracted while the debtor was a trader, I am of opinion that the existing statute has, in this respect, no retrospective operation, and that it speaks of and refers only to such persons as, at the time of its commencement, were, or should afterwards become, traders. Now it may be—I venture to say it is—a matter to be regretted that by the repeal of the 184th section of the Act of 1849, and the failure of the provisions of the existing statute to supply the defect occasioned by that repeal, the protection to creditors which the repealed section afforded has been lost to them, and some of the inconveniences which the state of the law antecedent to 1849 had occasioned will flourish in their old and vicious force. It may be that the Legislature will think fit, by some future enactment, to supply the existing defect. With these considerations I have nothing to do. I find the law clearly expounded and authoritatively established, and in accordance with that law I am bound to declare that the orders of the 6th of April and of the 2nd of June must be discharged. Having regard to what has taken place between the parties, the order now to be made must be so guarded as to do justice to all parties so far as is practicable. It appears that in consequence of the order of April (which, although it was not consented to, was concurred in by the Appellant,) the trustees have sold the goods taken in execution, and that this was done with the knowledge of, and without objection by, the Appellant. The order now to be made must, therefore, be to declare the rights of the creditor, direct an account to be taken of the goods seized in execution and sold by the trustees, and to direct them to pay over to the execution creditor the net proceeds which shall appear to have been received by them, deducting the costs and expenses attending and incident to the sale, and deducting also the sum of £25, which was paid to the sheriff. There can be no costs of the appeal, but the deposit must be returned to the Appellant.

Solicitors: Messrs. *Linklater & Co.*, agents for Mr. *Coaks, Norwich;* Messrs. *Slee, Ovans, & Bayley,* agents for Mr. *Taylor, Norwich.*

M. R.
1872
Jan. 15, 18.

LABOUCHERE *v.* DAWSON.

[1871 L. 174.]

Sale of Goodwill—Vendor setting up new Business—Right to solicit old Customers.

The vendor of a business and the goodwill thereof may, in the absence of express stipulation to the contrary, set up a business of the same kind either in the same neighbourhood or elsewhere, and may publicly advertise the fact of his having done so; but he must not solicit the customers of the old business to cease dealing with the purchaser, or to give their custom to himself.

PREVIOUSLY to June, 1871, a long-established brewery business had been carried on at *Kirkstall*, near *Leeds*, under the firm of *Benjamin Dawson & Co.* The Defendant, *Edwin Popplewell Dawson*, was entitled to two-fifths of this business; the remaining three-fifths formed part of the estate of *Benjamin Dawson*, deceased, which, in June, 1871, was being administered by the Court of Chancery.

On the 12th of June, 1871, an agreement in writing was entered into (subject to the sanction of the Court of Chancery) for the sale by *Edwin Popplewell Dawson* and the legal personal representative of *Benjamin Dawson* to the Plaintiffs, *Henry Labouchere* and *John Staniforth* (trustees for the Plaintiffs, the *Kirkstall Brewery Company, Limited*) of the brewery at *Kirkstall*, and the plant, fixtures, utensils, and machinery in and about the same, and also "the goodwill of the brewery business hitherto carried on at the premises in *Kirkstall* hereinbefore mentioned, and the exclusive right to use the name of *Benjamin Dawson & Co.* in connection with the business of brewers." The agreement contained no stipulations to prevent the Defendant from himself setting up business as a brewer.

The agreement received the sanction of the Court, and had been carried into effect by the Plaintiffs.

In December, 1871, the Defendant, *Edwin Popplewell Dawson*, commenced to carry on the business of a brewer at *Burton-upon-Trent*, and, as was alleged by the Plaintiffs, gave out that such new business was a continuation of the business formerly carried

on by the firm of *Benjamin Dawson & Co.*, and also, by his travellers and agents, solicited the customers of that firm for orders. Thereupon the present bill was filed, praying for an injunction to restrain the Defendant, first, from carrying on the business of a brewer in such a manner as to represent, or induce customers to believe, that the business carried on by him was the same as or in continuation of or in succession to or similar to the business of a brewer formerly carried on under the name of *Benjamin Dawson & Co.;* and, secondly, from soliciting orders from any persons who were customers of the late firm of *Benjamin Dawson & Co.* at the time when their business was purchased by the Plaintiffs, and from attempting to take away any portion of that business, and from doing any act prejudicial to the goodwill thereof.

A motion was now made for an injunction according to the terms of the prayer. At the Bar the Plaintiffs abandoned the relief sought, except as to the solicitation of customers. The Defendant, however, insisted on his right to solicit the customers of the old firm; and it was arranged that the question should be decided on the motion.

The *Solicitor General* (Sir *G. Jessel*), Mr. *Fry*, Q.C., and Mr. *W. F. Robinson*, for the Plaintiffs:—

We admit that the Defendant is fully entitled to set up business as a brewer,—nay, more, that he is entitled publicly to advertise the fact of his having done so; and if the old customers choose to deal with him, we cannot prevent them. But he must not directly solicit their custom, for by so doing he would destroy the goodwill which he has sold to the Plaintiffs. The principle that a man may not derogate from his own grant applies.

Sir *R. Baggallay*, Q.C., and Mr. *Marten*, for the Defendant:—

The purchasers of the goodwill of a business are liable to the chance of the vendors not retiring from business, and carrying off the customers of the old establishment: *Cook* v. *Collingridge* (1); *Davies* v. *Hodgson* (2). It is admitted that the Defendant may solicit the customers of the old firm by public advertisement, but

(1) *Collyer* on Partnership, p. 174. (2) 25 Beav. 177.

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it is said that he must not solicit them privately; but how is it possible to draw the line between public and private solicitation? If he may put an advertisement in the newspapers, why is he to be prevented from sending a circular? Moreover, why should the Defendant be prevented from soliciting old customers to purchase from him articles differing in kind or quality from those supplied by the old firm? No authority has been cited in support of the application; and in fact *Cruttwell* v. *Lye* (1) and *Churton* v. *Douglas* (2) are authorities the other way.

[They referred to *Johnson* v. *Helleley* (3) and *Hall* v. *Barrows* (4).]

Jan. 18. LORD ROMILLY, M.R.:—

This suit, as far as I can ascertain, appears to involve a new question. The facts are these:—[His Lordship stated them.]

The Defendant, having set up business at *Burton*, has solicited all customers to come to his place of business. Nobody can doubt that he was fully justified in doing that. The sale of the business did not prevent him from carrying on the same business in the same place or at *Burton*, which is a considerable distance off. But the question is this: Was he entitled to solicit personally the customers of the old firm to come and deal with him?

Now all the cases admit that he is entitled to carry on the same business wherever he pleases, and to solicit customers in any public manner that he pleases. Then it is argued that the power of soliciting the whole of the public to deal with him includes the power of soliciting any one particular person who is a member of the public. On the other hand, the Plaintiffs say this: "You cannot violate this principle, that if you sell a thing you are not entitled to take away its value. It is true that you sold it without binding yourself not to carry on the same business, yet you did sell it expressly including the goodwill, that goodwill being the probability of the old customers going to the new firm to which you have sold the business. The question is, may you go to those very

(1) 17 Ves. 335.
(2) Joh. 174.
(3) 34 Beav. 63; 2 D. J. & S. 446.
(4) 33 L. J. (Ch.) 204.

persons and try to prevent their giving their custom to the new firm? It is very true you have not entered into an express covenant that you will not do that; but there is an implied covenant to that effect, for a person cannot sell a thing and destroy the value of it."

I have considered the matter very carefully, and although the point is suggested or hinted at in one or two cases, yet in no case I have been able to find has this simple question come before the consideration of the Court. I am of opinion that the principle of equity must prevail, that persons are not at liberty to depreciate the thing which they have sold. Sir *Richard Baggallay* put this question to me very forcibly and very properly: Where are you to draw the line? I will state what appears to me the principle that applies to such cases. In a great number of cases the Court has to deal with a matter which is never precise until the facts are brought before the Court. There is no point on which a greater amount of decision is to be found in Courts of Law and Equity than as to what is reasonable; for instance, reasonable time, reasonable notice, and the like. It is impossible *à priori* to state what is reasonable in such cases. You must have the particular facts of each case established before you can ascertain what is meant by reasonable time, notice, and the like. So, in this case, I am of opinion the Defendant is not at liberty personally to solicit the customers of the old business to come to the new business. But this does not exclude what is a reasonable or fair solicitation of those customers; this, however, is a matter to be determined in each particular case. I will specify what appears to me to be the rule in the present case, so far as it can be laid down. In the first place the new firm, the Defendant in this case, is entitled to publish any advertisement he pleases in the papers, stating that he is carrying on such business. He is entitled to publish any circulars to all the world to say that he is carrying on such a business; but he is not entitled, either by private letter or by a visit, or by his traveller or agent, to go to any person who was a customer of the old firm and solicit him not to continue his business with the old firm, but to transfer it to him, the new firm. That is not a fair and reasonable thing to do after he has sold the goodwill. Customers, it is true, may be affected by public adver-

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tisements and public circulars, but that does not in the slightest degree militate against the principle I have laid down.

Then it is said, Where are you to draw the line? because this might happen, that a person might publish circulars in the papers, which circulars could have no meaning whatever, except as a solicitation to old customers of the old firm, and they would be unmeaning if they related to any new one. If such a question as that came before me, exactly in those terms, I should hold it to be merely a colourable departure from what he was not to be allowed to do, that is, to send a circular to customers of the old firm, requesting them as customers of the old firm not to go on dealing with the person to whom he had sold the business, but to retain and employ him, who had conducted the old firm. That is the way I should look at it, and therefore to that extent I should grant the injunction; and I should say that the Defendant was not to be at liberty to apply to any of the old customers privately, by letter, personally, or by traveller, asking them to continue their custom with the Defendant, and not to go to the vendees. There I should stop, and I should test any other case by considering whether it was within those limits or not. That is the general way in which I should look at it. I have considered the case as much as I could as the parties were disposed to say that they would, subject of course to the right of appeal, cousider this as the hearing of the cause; I therefore thought it would be desirable for me to consider what I ought to do with the costs, whereas in the case of an ordinary motion they would be governed by the general rule. Treating it as the hearing, I think this is a case in which I should not give any costs at all. I do not think the point has been decided, at least I cannot find it has been decided, or intended to be decided, in any of those several cases before Lord *Eldon*, who was the great authority on the principles relating to these matters. Therefore I shall grant this injunction, without costs; and, with the consent of all parties, stay all further proceedings in the cause, but reserving liberty to apply in case anything should require it subsequently.

MINUTES:—Order that an injunction be awarded against the Defendant, *Edwin Popplewell Dawson*, to restrain him, his partners, servants, or agents, from applying

to any person who was a customer of the firm of *Benjamin Dawson & Co.* prior to the 12th of June, 1871, privately, by letter, personally, or by a traveller, asking such customer to continue to deal with the Defendant, or not to deal with the Plaintiffs, the *Kirkstall Brewery Company, Limited.*

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Solicitors: Messrs. *Nash, Field, & Layton;* Messrs. *Paterson, Snow, & Burney.*

In re HASELFOOT'S ESTATE.

M. R. 1872 Jan. 20, 29.

CHAUNTLER'S CLAIM.

Mortgagee of Testator—Unsecured Debt—Balance of Policy Moneys—Right to retain or tack.

The mortgagees of a policy of assurance, mortgaged to them by a deceased testator to secure a sum of money, received after the testator's death, under the policy, a sum exceeding the amount due to them for principal and interest in respect of the mortgage debt. They were also creditors of the testator for other debts not secured:—

Held, that they were entitled to retain the balance in their hands in discharge of their unsecured debts.

Spalding v. *Thompson* (1) followed.

THIS was a case adjourned from Chambers in a suit to administer the estate of *T. P. Haselfoot*, a deceased testator.

The testator had mortgaged to Messrs. *Chauntler & Crouch* a policy of assurance to secure the sum of £300 and interest. At the death of the testator they had received from the insurance office £500; but the amount to which they were entitled for principal, interest, and costs was £438 7*s.* 8*d.*, so that they had a balance in their hands of £61 12*s.* 4*d.*

Messrs. *Chauntler & Crouch* claimed to be entitled to retain the balance in part discharge of a bill of costs due to them by the testator for private business, amounting to £93 3*s.* 9*d.*, and another bill of costs for £30 for costs incurred in his behalf in a suit. The testator's estate was insolvent.

The executor of *Haselfoot* contended that the balance ought to be paid to him as part of the testator's estate, and that the

(1) 26 Beav. 637.

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claimants could only come and prove in the suit with the other creditors for the amount of their debts. It was agreed that the parties should submit to the jurisdiction of the Court in the same way as if a bill for redemption had been filed by the executor, with a prayer for further relief.

Mr. *Southgate*, Q.C., for the claimants:—

In this case Messrs. *Chauntler & Crouch*, having in their hands a larger balance than the amount due to them for principal, interest, and costs, are entitled to retain such balance in satisfaction of the debt due to them from the testator.

The case is governed by *Spalding* v. *Thompson* (1). In that case Lord *Suffield* had effected a policy for £500 to secure a judgment debt for that amount due from him to *Thompson*. A second judgment was obtained by *Thompson* against him for a second debt of £555. Lord *Suffield* then conveyed his estates to trustees to secure payment to his judgment creditors, after which *Thompson* obtained a third judgment against him for £221, and on his death *Thompson* obtained payment of the policy money, and, without disclosing that fact, also received from the trustees of the deed the amount due on the first and second judgment. In a suit by Lord *Suffield's* executor to recover the amount of the policy money, it was held that *Thompson* was entitled to retain it in discharge of the three judgment debts. The testator in the present case was in a similar position to Lord *Suffield*, and the decision is a direct authority in favour of the claimants.

In *Rolfe* v. *Chester* (2) it was held that since 3 & 4 Will. 4, c. 104, a mortgagee might tack a simple contract debt to his mortgage debt as against the heir, devisee, or executor, wherever the equity of redemption was assets in their hands for payment of simple contract debts. There your Lordship observed that the principle stated by Lord *Macclesfield* in *Coleman* v. *Winch* (3) established the right of the mortgagee to tack the simple contract debt. The same principle was recognised in *Thomas* v. *Thomas* (4). The case now comes before the Court on the same footing as if a bill for redemption had been filed by the executor of *Haselfoot*, and I

(1) 26 Beav. 637.
(2) 20 Ibid. 610.
(3) 1 P. Wms. 775.
(4) 22 Beav. 341.

contend that he could not now redeem without paying to the mortgagees the amount due to them for the bills of costs.

Mr. *Hemming*, for the executor of *Haselfoot*:—

The claimants have no right to tack their own simple contract debt to the amount due on the mortgage, to the prejudice of the other creditors of the testator. The law is perfectly well settled. In the first place, neither specialty nor simple contract debts (not being charges on the estate) can be tacked against the mortgagor. But on the mortgagor's death these debts, like all other debts become in a sense charges on both real and personal estate, which are assets for debts. Therefore, as against the estate of a deceased mortgagor, debts for which the real estate was assets could always be tacked to a mortgage of realty against the heir or devisee, and mere simple contract debts could, in like manner and for the same reason, be tacked against the executor to a mortgage of chattels. This rule was established (as to realty) in *Coleman* v. *Winch* (1), on which your Lordship's decision in *Rolfe* v. *Chester* was founded; and other authorities are cited in *Fisher* on Mortgages (2). But at the same time it was laid down that this tacking against the estate was not permitted to the prejudice of other creditors having a like charge on the assets: *Heams* v. *Bance* (3); and this doctrine also was followed by your Lordship on the second occasion when *Rolfe* v. *Chester* (4) was mentioned. *Thomas* v. *Thomas* (5) and *Irby* v. *Irby* (6) are to the same effect. Just as, in *Heams* v. *Bance* it was held, by Lord *Hardwicke*, that a mortgagee who lent a further sum upon bond could only tack it to his mortgage subject to the rights of, and so as not to prejudice, creditors under a will by which real estate was made assets for payment of debts, so a mortgagee of personalty cannot tack a simple contract debt except subject to the rights of, and so as not to prejudice, general creditors; for personal estate in the hands of an executor is precisely in the same position *quâ* a mortgagee of personalty being also a simple contract creditor, as real estate made assets for payment of debts is *quâ* a mortgagee of

(1) 1 P. Wms. 775.
(2) Vol. ii. ss. 1218, 1219.
(3) 3 Atk. 630.
(4) 20 Beav. 613.
(5) 22 Ibid. 341.
(6) Ibid. 217.

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realty being also a bond creditor. Therefore the mortgagees of the policy can have no right to tack the other debts due to them from the testator's estate, because it would put them in competition with other creditors. There is clearly no case for set-off, the demands being in different rights; and, in fact, this has not been contended for. The only right that could arise in this case would be that of tacking, and if, as I submit, that cannot be established, there is no other ground on which the balance can be retained.

Spalding v. *Thompson* (1) is distinguishable. There the relation between the parties was such that, according to your Lordship's view, the mortgagor himself could not be redeemed without tacking, which was certainly not the case with the present testator. That was a case, moreover, arising on judgment debts, and cannot in any way affect the principle of *Heams* v. *Bance* (2), and *Rolfe* v. *Chester* (3), and *Irby* v. *Irby* (4), in all of which it was held that, where the rights of other creditors would be affected, mortgagees were not entitled to tack, even after the death of the mortgagor. Here the mortgagees have no right of tacking, retainer, or set-off, and they cannot avail themselves of this method to obtain payment in full of their own debts, the result of which would be that, in case of deficiency of assets, all other creditors would be compelled to accept a dividend.

Mr. *Southgate*, in reply:—

It has been contended that *Spalding* v. *Thompson* is distinguishable on the ground that the debts there were judgment debts; but that cannot affect the principle of the decision. This case cannot be distinguished from *Coleman* v. *Winch* (5), which decided that an executor could not redeem unless he paid the whole of the debts due from him to the mortgagor. An argument has been founded on the rights of other simple contract creditors, but their existence cannot affect the right of the mortgagees. *Heams* v. *Bance* does not apply. Your Lordship's remarks in *Spalding* v. *Thompson* (6) are exactly in point, where, after saying that if the policy had been on the life of a stranger, Lord *Suffield* could

(1) 26 Beav. 637.
(2) 3 Atk. 630.
(3) 20 Beav. 610.
(4) 22 Beav. 217.
(5) 1 P.Wms. 775.
(6) 26 Beav. 641.

not have enforced payment of the money without payment of the third judgment for £221, your Lordship observes:—"I have to consider whether it makes any difference that the policy was on the life of Lord *Suffield*, and that the person now suing is his legal personal representative. I cannot see any distinction. It is equally the property of Lord *Suffield* or part of his estate which came properly into the hands of the Defendant, and which neither Lord *Suffield* nor his executor is entitled to take away until the Defendant has been paid what is due to him."

Jan. 29. LORD ROMILLY, M.R.:—

This is a case adjourned from Chambers upon the following facts, which were agreed upon:—[His Lordship then stated the facts of the case.] The question is, whether Messrs. *Chauntler & Crouch* are entitled to retain the balance in their hands in discharge of the amount which is due to them, or whether they must come in and prove for their bills of costs and take a dividend upon the estate. Of course the question would not arise unless the estate were insolvent. I think they are entitled to retain the amount of the bills of costs out of the balance in their hands.

The case of *Spalding* v. *Thompson* (1), which was cited, seems to me precisely in point. It is very true that it is a decision of my own, but I do not find that it has ever been reversed or doubted. I have reconsidered the point as to whether the decision is right; I think it is, and I must be bound by it on the present occasion. It does not appear to me to be a case of set-off at all. This is a case in which there was at the death of the testator a sum of money coming into the hands of strangers, and which is claimed by the executor as part of the testator's estate. The strangers say that the testator owed them some money, and that therefore they are entitled to retain as much as would pay the whole of the amount due to them. This is not a question of set-off. The question of set-off arises where there are different payments by a testator to a stranger, and by the stranger to the testator, and different rights in respect of such payments. It might arise in such a case as this:

(1) 26 Beav. 637.

M. R.
1872
In re HASELFOOT'S ESTATE.
CHAUNTLER'S CLAIM.

where a stranger is a debtor to the testator's estate at the time of his death for £1000, and the executor files a bill or brings an action against him for the amount of his debt, and the creditor says, "It is very true, I owed £1000 on this account, but the testator owed me £1000 upon another account," and there is no parity between these accounts—in that case, if the debts arose in different rights, the Court would not allow a set-off. The creditor might institute proceedings against the executor, but he must pay his debt to the estate, and he would be entitled only to his dividend. But it would be a strong thing to say that where a man has got a part of the estate of a testator in his hands, and the testator owes him a sum of money, he cannot be called upon to deliver up the whole, and can only come in for a dividend upon the testator's estate. I do not think that is the law. I have never so held, and in former cases I have always distinguished such a case from one of set-off where there is a cross demand. Here the claimants only seek to retain what is due to them, and if the executors have any demand upon the fund, it is upon the surplus and balance which will remain after discharging the debt. I am of opinion, therefore, that the claimants, having a part of the testator's estate in their hands, are entitled to retain enough to discharge what is due to them. I think there should be no costs of this proceeding. The executor is entitled to his costs out of the estate.

Solicitors: Messrs. *Chauntler, Crouch, & Spencer;* Messrs. *Lucas & Coe.*

In re STOKES' TRUSTS.

M. R.
1872
Feb. 17, 19.

Trustee Acts—Retiring Trustee—Impossibility of finding Successor—Appointment of Continuing Trustees in place of Continuing and Retiring Trustees.

When a trustee wishes to retire, and a successor cannot be found, the Court can appoint the continuing trustees to be sole trustees in the place of the continuing and retiring trustees.

THIS was a Petition under the *Trustee Acts* by the *cestuis que trust* under the will (dated the 7th of June, 1867) and five codicils of *George Stokes*, who died on the 27th of August, 1870. The testator appointed *Mary Ann Stokes*, *George Edward Stokes*, and *F. M. Ball*, trustees of his will and codicils (two of whom, viz., *Mary Ann Stokes* and *George Edward Stokes*, were also beneficiaries thereunder). He availed himself of the statutory powers of appointing new trustees, but expressly directed that upon any new appointment the number of trustees might be augmented or reduced.

The trust property consisted of leaseholds, stock, and cash.

In January, 1872, *John Puddick* was appointed a new trustee of the will and codicils in the place of *F. M. Ball*: and the leaseholds were assigned so as to become vested in *Mary Ann Stokes*, *George Edward Stokes*, and *John Puddick*; but the stock and cash had not been transferred.

George Edward Stokes now wished to retire from the trust, but a successor could not be found. Under these circumstances the Petitioners asked for the appointment of *Mary Ann Stokes* and *John Puddick*, to be trustees of the will and codicils, in the place of *Mary Ann Stokes*, *George Edward Stokes*, and *John Puddick*; and for a vesting order.

Mr. *Charles Hall*, for the Petitioners, submitted that if *George Edward Stokes* had retired in January, 1872, when *Puddick* was appointed, the appointment of *Puddick* as trustee in the place of *G. E. Stokes* and *F. M. Ball* would have been valid; that such an appointment as now sought was within the *Trustee Act*, 1850, s. 32, and was in itself most reasonable. The only result of a refusal of

M. R. 1872 *In re* STOKES' TRUSTS.

the order would be the institution of an administration suit, in which all proceedings would be immediately stayed as against *George Edward Stokes*.

THE MASTER OF THE ROLLS said that the application was entirely novel, and would require consideration before it was granted.

Feb. 19. THE MASTER OF THE ROLLS said, that although he had never met with such a case before, he considered Mr. *Hall's* argument to be well founded, and that such an order as was required could be made under the *Trustee Acts*; and he made the order as prayed.

Solicitors: Messrs. *M. & F. Davidson.*

M. R. 1871 *Dec.* 9.

Ex parte CORPUS CHRISTI COLLEGE, OXFORD.

Railway Company—Lands taken by different Companies—Permanent Investment of Purchase-money—Costs.

Portions of lands belonging to a corporation were taken by four different companies, the undertakings of three of which afterwards became united:—

Held, that the costs of a joint permanent investment of the purchase-moneys must be borne in halves by the subsisting companies.

In re Maryport Railway Act (1) doubted and not followed.

THIS was a Petition for the permanent investment of six sums of money paid into Court under the *Lands Clauses Consolidation Act* in respect of six pieces of land formerly belonging to *Corpus Christi College, Oxford*, which had been taken for the purposes of certain railway companies. Two of these pieces of land had been taken by the *South Western Railway Company*, two by the *Great Western Railway Company*, one by the *Oxford and Rugby Railway Company*, and the remaining one by the *Cheltenham and Great Union Railway Company*. After the lands were taken, but before the purchase-money was paid into Court, the two last-

(1) 32 Beav. 397.

M. R.
1871
Ex parte Corpus Christi College, Oxford.

named companies were merged by Act of Parliament in the *Great Western*. The moneys, however, were paid in to the accounts of the old companies, whose undertakings had been transferred to the *Great Western Railway Company*.

The only question was as to how the costs were to be borne.

Mr. *Cookson*, for the Petitioners.

Mr. *Gaselee*, for the *South Western Railway Company*, submitted that, as the lands had been taken by four railway companies, three of which were now represented by the *Great Western Railway Company*, the *South Western Company* ought to bear only one-fourth of the costs, and the *Great Western Company* ought to bear the remaining three-fourths: *In re Maryport Railway Act* (1).

Mr. *H. A. Giffard*, for the *Great Western Railway Company*:—

In the case cited the moneys were paid into Court by three distinct companies, the *Maryport Company*, the *South Durham Company*, and the *Eden Valley Company*. After the payment had been made the two latter companies were dissolved, and their rights and liabilities transferred to the *Stockton and Darlington Railway Company*. Here the rights of the *Oxford and Rugby Railway Company* and the *Cheltenham and Great Union Railway Company* were transferred to the *Great Western Railway Company* before the payment into Court; and though the money was paid to the accounts of the two defunct companies, it was in reality paid by the *Great Western Railway Company*. The costs ought to be borne equally, according to the rule laid down in *Ex parte Bishop of London* (2).

The Master of the Rolls expressed a doubt whether the case of *In re Maryport Railway Act* had been correctly decided; and ordered the costs to be borne equally by the *South Western* and *Great Western Companies*.

Solicitors: Messrs. *Pownall, Son, Cross, & Knott*; Mr. *Crombie*; Messrs. *Young, Maples, Teesdale, & Co.*

(1) 32 Beav. 397. 9 Jur. N.S. 1217. (2) 2 D. F. & J. 14. 6 Jur. N.S. 640

M. R.

1872

Feb. 21, 26.

In re JONES.

Solicitor—Returning Officer for Election of School Board—Elementary Education Act, 1870—*Bill of Costs—Taxation.*

A solicitor, who was appointed returning officer for the election of a school board under the *Elementary Education Act*, 1870, sent in a bill of his charges in the usual form of a solicitor's bill of costs, including both the election charges proper, and attendance at the board after the election was over. On a motion to discharge the common order for taxation :—

Held, that, as he had by the form of his bill of costs constituted himself solicitor to the board, the bill in question was liable to taxation.

THIS was an application on behalf of Mr. *R. Bevan Jones*, a solicitor, to discharge a common order for taxation of a bill of his fees and charges as returning officer of the *Llannon* School Board, in *South Wales*, on the ground that they were not taxable under the statute.

Mr. *Jones* acted as returning officer in consequence of a requisition sent to him by the Education Department, requiring him to take proceedings for the election of a school board in the said parish. He accordingly took the necessary steps, the election was held, and he attended the first meeting of the school board, and took down the minutes of the proceedings.

The bill in question was in the ordinary form of a solicitor's bill of costs, and amounted to the sum of £25 17*s.* 7*d.* It contained the following among other items :—

	£	*s.*	*d.*
"Having received answer from Education Department to elect school board, instructions for notice accordingly .		6	8
"Instruction for forms of voting papers .		6	8
"Drawing same		5	0
"Copy for printer		2	0
"Engaged all day conducting election .	3	3	0
"Instructions for declaration of poll .		6	8
"Attending first meeting of board and drawing up minutes of proceedings . .	2	2	0
"Writing Education Department respecting first meeting		5	0
"Letters, messengers, &c. . . .		10	6."

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The school board obtained the common order for the taxation of the said bill.

By the first part of the second schedule to the *Elementary Education Act*, 1870 (33 & 34 Vict. c. 75), it is provided that the Education Department may order the appointment of any officers for the purpose of the election of a school board, and that the expenses of the election and taking the poll in any district, other than the metropolis, shall be paid by the school board out of the school fund.

Mr. *Fry*, Q.C., and Mr. *Bevir*, in support of the motion:—

This bill is not taxable under the *Solicitors Act*, for the Court has no jurisdiction over a solicitor in respect of any act done by him, except in his character of solicitor. The returning officer, under the *Elementary Education Act*, is not necessarily a solicitor, and the accident of his being a solicitor in this case cannot give the Court jurisdiction to order his bill of fees and charges to be taxed. We admit that the charges are in the form of a solicitor's bill, but that cannot affect the right of taxation.

In the case of *In re Ward* (1) it was held that the fees of a steward of a manor, who was a solicitor, but acted in the character of steward only, were not taxable under 6 & 7 Vict. c. 75.

Mr. *Southgate*, Q.C., and Mr. *Everitt*, for the School Board:—

This is a different case from that of *In re Ward*. We do not deny that some one not a solicitor or attorney might have been appointed returning officer, and that then his charges could not have been taxable. But if a solicitor is appointed returning officer, and he sends in a solicitor's bill of costs, he cannot say that the school board are precluded from taking that course which the statute has provided to ascertain what the amount of the bill is. The test is this:—Suppose that *Jones*, having delivered a solicitor's bill, had wrongfully obtained possession of assets beyond the amount of his bill and retained him, could not a summary application have been made to oblige him to give them up? Again, if he had brought an action on this bill within the month, could not the Court have set it aside? If he had charged a lump

(1) 5 Beav. 401.

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sum the case would have been different, but he has, by the form of his bill and by the nature of the charges, one of which is for attendance at the board after the election was over, chosen to constitute himself a solicitor. On these grounds we submit that the order was regular.

Mr. *Fry*, in reply:—

The mere fact of the bill being in the form of a solicitor's bill is not sufficient, as it was accompanied by no statement of special circumstances. He was performing the duties, not of a solicitor, but of a returning officer, in respect of which this Court has no jurisdiction.

Feb. 26. LORD ROMILLY, M.R.:—

I am of opinion that Mr. *Jones* has constituted himself the solicitor for the school board, and that his bill of costs is taxable. The bill is not confined to his duties as returning officer, but includes an item for attending the first meeting of the board and preparing the minutes of proceedings.

The motion must be refused, but as the case is one of general importance, the costs must be costs in the matter.

Solicitors: Messrs. *G. L. P. Eyre & Co.*; Mr. *Calcott.*

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1871
Nov. 13, 14.

[1870 B. 250.]

Metropolis Local Management Acts Amendment Act, 1862 (25 & 26 *Vict. c.* 102, *ss.* 75, 107)—*Summons against Builder—Person engaged in any Work—Occupier not served—Time for taking out Summons—Completion of Framework of Building.*

A summons under the Metropolis Local Management Acts Amendment Act, 1862, for building beyond the general line of buildings in a street, is only good against the builder if it is issued whilst the building complained of is in course of erection. After the completion of the work, the summons should be against the owner or occupier.

The six months limited by sect. 107 for the commencement of any proceedings for penalties under the Act, begins to run from the time when the structure is discovered to be so far advanced as to shew the full extent of the projection complained of, and not from the completion of the building.

THIS was a suit by the occupier of a house, No. 12, *Queen Street, Mayfair*, to restrain the *Vestry of St. George's, Hanover Square*, from demolishing a conservatory which they alleged extended beyond the general line of buildings in the street, and was, therefore, within the provisions of sect. 75 of the *Metropolis Local Management Acts Amendment Act*, 1862 (25 & 26 Vict. c. 102) (1).

(1) Sect. 75 is in the following words:—"The one hundred and forty-third section of the first recited Act, and the one hundred and fortieth section of the Act passed in the seventh year of His Majesty King *George* the Fourth, chapter one hundred and forty-two, intituled an Act for consolidating the trusts of the several turnpike roads in the neighbourhood of the Metropolis north of the River *Thames* are hereby repealed; and in lieu thereof be it enacted, that no building, structure, or erection shall, without the consent in writing of the Metropolitan Board of Works, be erected beyond the general line of buildings in any street, place, or row of houses in which the same is situate, in case the distance of such line of buildings from the highway does not exceed fifty feet, or within fifty feet of the highway when the distance of the line of buildings therefrom amounts to or exceeds fifty feet, notwithstanding there being gardens or vacant spaces between the line of buildings and the highway, such general line of buildings to be decided by the superintending architect to the Metropolitan Board of Works for the time being; and in case any building, structure, or erection be erected, or be begun to be erected or raised, without such consent, or contrary to the terms and conditions on which the same may have been granted, it shall be lawful

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The house in question was a corner house, and had a portico projecting over the front door about four feet beyond the main wall of the house, and the portico was surmounted by a wall between three and four feet high, which formed a sort of parapet to it. In August, 1869, the Plaintiff contracted with a builder, named *Thomas Rudkin*, to erect a conservatory of wood and glass upon the portico. The contract provided that the work should be completed by the 10th of September. As a preliminary work, it was necessary to pull down the parapet wall. The work was begun on the 15th of August, and, as far as the frame-work was concerned, was completed by the 24th of August, and the whole was completed by the 20th of September.

On the 26th of August, 1869, one of the parish officers came and inspected the works, and took down the name and address of the builder and of the Plaintiff. The Plaintiff thereupon called upon the clerk to the vestry, and stated that if the vestry had any

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for the vestry of the parish, or the board of works for the district in which such building or erection is situate, to cause to be made complaint thereof before a justice of the peace, who shall thereupon issue a summons requiring the owner or occupier of the premises, or the builder or person engaged in any work contrary to this enactment, to appear at a time and place to be stated in the summons to answer such complaint, and if at the time and place appointed in such summons the said complaint shall be proved to the satisfaction of the justice before whom the same shall be heard, such justice shall make an order in writing on such owner or occupier, builder or person, directing the demolition of any such building or erection, or so much thereof as may be beyond the said general line so fixed as aforesaid, within such time as such justice shall consider reasonable, and shall also make an order for the payment of the costs incurred up to the time of hearing; and in default of the building or erection complained of being demolished within the time limited by the said order, the said vestry or board shall forthwith enter the premises to which the order relates, and demolish the building or erection complained of, and do whatever may be necessary to execute the said order, and may also remove the materials to a convenient place, and subsequently sell the same, as they think fit; and all expenses incurred by the said vestry or board in carrying out the said order and in disposal of the said materials, may be recovered by the said vestry or board from the owner or occupier of the said premises, or the builder or person engaged in the work, either by action at law or in a summary manner before a justice of the peace, at the option of the said vestry or board, in manner provided by the two hundred and twenty-seventh section of the firstly recited Act as to the recovery of penalties."

objection to the proposed building he should fight the question, and that he wished to know, before he paid the contractor or proceeded with the building. No further complaint being made, the Plaintiff allowed the building to be completed, and paid the builder.

The Defendants then determined to endeavour to obtain an order for the demolition of the building, under sect. 75 of the *Metropolis Local Management Acts Amendment Act*, 1862, and on the 22nd of September, 1869, in consequence of a report of their surveyor then laid before their committee of works, they gave instructions to one of their officers to ascertain whether the Metropolitan Board of Works had sanctioned the building. Mr. *Vulliamy*, the superintending architect to the Metropolitan Board, on being applied to, stated that no such sanction had been given, and recommended that action should be taken under sect. 75 of the Act.

The Defendants thereupon took steps to obtain the certificate from Mr. *Vulliamy* that the conservatory projected beyond the line of buildings in the street, and on the 14th of January, 1870, they wrote to *Rudkin*, the builder, that steps would be taken against him unless the building in question was removed. It did not appear whether *Rudkin* received that letter or not, but some time shortly either before or after that date he disposed of his business and went to *Australia*.

On the 2nd of March, 1870, the Defendants received the certificate of Mr. *Vulliamy* that the conservatory projected beyond the line of building in the street, and on the 4th of March, 1870, a summons, returnable on the 11th of March, was issued by Mr. *Knox*, the police magistrate, against *Thomas Rudkin* for unlawfully erecting a bay window or conservatory of wood and glass over the portico of the house, No. 12, *Queen Street, Mayfair*, without the sanction of the Metropolitan Board of Works, beyond the general line of building.

The summons was left at the place of business formerly used by *Rudkin*, and on the 10th of March the foreman who had superintended the erection, and was in the employment of *Rudkin's* successor, brought the summons to the Plaintiff. The hearing of the summons was adjourned from time to time, but came on to be

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heard before Mr. *Knox* on the 22nd of April. The Plaintiff had instructed counsel to appear on his behalf and oppose the order, but an objection was taken on behalf of the Defendants to his right to be heard, on the ground that the summons was directed, not against him, but against the builder.

The Plaintiff, in order to escape the technical objection, and to have an opportunity of being heard, directed that his counsel should also be instructed to appear on behalf of *Rudkin*. Mr. *Knox* then made an order for the demolition of the conservatory, but gave leave to state a case for the opinion of the Court of Queen's Bench. He had inspected the structure, and pronounced it an improvement to the appearance of the street. Delay took place in settling the case, from the illness of the Plaintiff and the absence of *Rudkin*, and on the 30th of July, 1870, the Defendants' surveyor wrote to the Plaintiff, stating that, in accordance with the orders of the vestry, he should commence to demolish the conservatory, and the Plaintiff wrote in answer, requesting the surveyor to call upon him before commencing the demolition. He, however, replied that his instructions were peremptory, and that he had no discretion. No one except the Defendants made any objection to the conservatory, and the next door neighbour said he considered it an improvement.

The bill was accordingly filed, and an interim order was made on the 2nd of August. The Plaintiff still desired to have the case stated for the opinion of the Queen's Bench, but the Defendants declined to continue the negotiations, on the ground that the magistrate had no power to grant a case after the order had been drawn up and signed by him.

The suit was now heard on motion for decree.

Mr. *Cottrell*, and Mr. *Hume Williams*, of the Common Law Bar, for the Plaintiff:—

The summons is bad, having been served upon the wrong person. The *Metropolis Local Management Acts Amendment Act*, s. 75, requires a summons to be issued against "the owner or occupier or the builder or person engaged in any work contrary to this enactment." At the time this summons was taken out there was no person engaged in any work, and the only persons against

whom a summons could have issued were the owner and occupier, and the Defendants are bound by this objection, having insisted before the magistrate upon treating the summons as being against *Rudkin*. The meaning of the Act is, that if the structure complained of is completed, the summons must be against the owner or occupier; if not completed, it may also be against the builder, who, while engaged in the work, would be compelled to notice such a summons. The summons is also bad, as being out of time. The offence, if any, was really committed on the 24th of August, when the framework was put up, and the six months during which it was possible, under sect. 107 of the Act, to proceed for penalties, began to run from that time (1). Consequently, the six months had expired before the summons was taken out, and all remedy was gone. The architect's certificate does not conclude all question as to whether a structure projects beyond the line of building of the street: *Simpson* v. *Smith* (2). The vestry have no right to do what they have attempted here—that is, to order part of the Plaintiff's house to be pulled down without allowing him to be heard on the question: *Cooper* v. *Wandsworth Board of Works* (3).

Mr. *Schomberg*, Q.C., and Mr. *Streeten*, of the Common Law Bar, for the Defendants:—

The vestry have no power to take proceedings under sect. 75 without the certificate of the superintending architect to the Metropolitan Board of Works that the structure complained of extends beyond the general line of buildings in the street. This certificate is a necessary preliminary to the decision of the magistrate: *Vestry of St. George's, Hanover Square* v. *Sparrow* (4). And when the magistrate, having the certificate before him, has given his decision, it is final—*Simpson* v. *Smith*—even if the certificate itself is not conclusive: *Bauman* v. *Vestry of St. Pancras* (5).

(1) Sect. 107 is in the following words:—"The two hundred and thirty-third section of the firstly recited Act is hereby repealed; and in lieu thereof be it enacted, that no person shall be liable for the payment of any penalty or forfeiture under the recited Acts or this Act, or any bye-law made by virtue thereof, for any offence made cognizable before a justice, unless the complaint respecting such offence shall have been made before such justice within six months next after the commission or discovery of such offence."

(2) Law Rep. 6 C. P. 87.

(3) 14 C. B. (N. S.) 180.

(4) 16 Ibid. 209.

(5) Law Rep. 2 Q. B. 528.

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The vestry took steps to obtain the certificate of the architect as soon as the structure was completed, and they issued the summons as soon as they obtained the certificate. There has, therefore, been no laches, and there is no hardship on the Plaintiff in ordering the structure to be demolished, inasmuch as he knew that he was building at his peril when he did so without obtaining the permission of the Metropolitan Board.

The summons as issued is quite within the provisions of the Act. It may be either against the owner, or against the occupier, or against the builder, or, lastly, against any one, such as a labourer, engaged upon the work complained of; and the vestry have a full option as to which of those parties they will proceed against.

The summons is within the time limited by the Act. Time does not begin to run till the completion of the building complained of, for otherwise a builder might always defeat the Act by delaying the completion of his building till more than the six months had elapsed.

SIR R. MALINS, V.C., after stating the facts of the case, continued:—

The framework being completed on the 24th of August, I am clearly of opinion that the offence, if there was any, was then committed, and that from that time the six months prescribed by the statute began to run, and it consequently expired on the 25th or 26th of February following. These Acts must receive a reasonable construction, and a work complained of by the parish authorities might have been a large one, which would take a year or two to complete, and then, when it is obvious that what they regard as an offence is about to be committed, by the erection of the framework or outer wall, as the case may be, it cannot be contended that they may lie by for a year, and let the party incur all the expense of the building, and then say the offence was not committed till the work was completed, and six months afterwards come forward and say they are in time, because there was no offence till the work was completed. My opinion is, that in the case of building beyond the line of the street, the offence is committed the moment it is clear that there will be an intru-

sion on the prohibited space, and from that time the Act begins to run.

Then this offence being completed, according to my view, on the 24th of August, but even on the evidence of the parish authorities on the 20th of September, they make no remonstrance or communication to the Plaintiff, but on the 4th of March, 1870, they take out a summons before Mr. *Knox*, not against the Plaintiff, but against *Rudkin*, the builder, who had in the meantime given up his business and gone to *Australia*, or somewhere. The summons is then left at *Rudkin's* former place of business, there being no evidence of his being alive, and it is only by an accident that it reached the Plaintiff; and if it had not reached him, this farce would have been gone through, that an order would have been made upon *Rudkin* to pull down part of the Plaintiff's house, and, if he had not obeyed the order, it would have been done by the parish authorities. It is most remarkable that such an absurd course should be thought justifiable by any one, and incredible that it should affect any one's property in *England*.

It then being admitted by the parish authorities that if I dismiss this bill the Plaintiff will be entirely at their mercy, and they may send some one to demolish the conservatory, I must now decide the question between the parties. The Act of Parliament contains very stringent powers, which the necessities of the community may require, but which must be reasonably exercised, and it is of the highest importance that parties affected by the exercise of them should have proper notice of what is about to be done, and an opportunity of being heard. That is one of the points decided in *Cooper* v. *Wandsworth Board of Works* (1), where the parish officers of *Wandsworth* sent a party of workmen to demolish a house in contravention of an Act of Parliament, without giving any notice to the owner. He brought an action against them, and the Court of Common Pleas decided that it was not right to demolish his property without his being heard on the question. In the present case, the Plaintiff's house, or part of it, for the principle is the same, would have been demolished without his having the slightest opportunity of being heard on the subject.

It is contended that a proper notice was given to the builder.

(1) 14 C. B. (N. S.) 180.

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The Act of Parliament is very reasonably framed, and is undoubtedly for the public benefit. I quite agree with all the observations which have been cited from the judgment of the Court of Common Pleas, that it is for the public benefit that the uniformity of streets should be maintained, and that those who interfere with that uniformity should be brought to justice in a regular manner; and the Act of Parliament provides very regular and distinct machinery for the purpose. [His Honour then read sect. 75 of the *Metropolis Local Management Acts Amendment Act*, 1862, and continued:—]

Now observe the power. They are to give notice to the occupier, builder, or person engaged in the work contrary to the enactment, and then they make an order that such builder is to demolish. Here the builder is no longer engaged in the work. Mr. *Rudkin* had no more connection with it after he went away on the 20th of September, when his work was done, than his footman, if he had one, who might have been discharged the same day, would have had on the 4th of March. I cannot conceive a proceeding more absurd, more unwarranted, and more irrational, than that this vestry, or their advisers, should have thought it proper to serve this notice upon Mr. *Rudkin*, who, six months before, erected this building, and who probably did not care whether it was pulled down or left to remain, and who was in fact a total stranger to the matter. The obvious meaning of the Act, in my opinion, is that where there is a known occupier and a builder, the proper person to proceed against is the occupier, who is the employer of the builder, and that the builder is named in the Act of Parliament because in many cases the parties do not know who employs him, and their notice to the builder is in such a case considered to be sufficient. I cannot doubt that this is the reasonable construction of the Act, for it says that the notice must be to the builder, or person engaged in any work contrary to the enactment, so that it is not sufficient to give notice to a person who has some time previously been engaged in the work. And I entirely agree with the reason given by Mr. *Hume Williams* for that, namely, that while he is engaged in the work he will naturally think it his duty to take some notice of a proceeding of this sort. But when he has completed the work, been paid, and gone away, it is imma-

terial to him whether the work is ordered to be pulled down, or is maintained.

I am, consequently, of opinion that the notice of the 4th of March to Mr. *Rudkin* was altogether void. Being a notice neither to the owner nor to the occupier, nor to any person engaged in building, it was altogether a nullity, and I cannot conceive anything more irrational than that the vestry should present this notice to Mr. *Rudkin*, and then, when he was not to be found, by their counsel object to the appearance of counsel for the occupier, on the ground that he was not served with the summons, and should then endeavour to enforce an order which they had thus obtained, that Mr. *Rudkin* should go and demolish part of the Plaintiff's house, and insist that if he did not do so, they would demolish it themselves.

I decide, then, that the offence was committed upon the 24th of August, when the framework of the conservatory was put up. Mr. *Streeten* has argued very ably for his view, which I think wholly unsustainable; but he admitted in effect that the offence was committed on the 24th of August, when he allowed that a summons might have been taken out on the 25th. Mr. *Schomberg* argued that the vestry could do nothing till the architect to the board of works had made his report. Accordingly they correspond for six months with Mr. *Vulliamy*, and at last obtain a certificate behind the back of the Plaintiff that the conservatory projects beyond the line of building of the street, and then treat the builder as the only person interested. Now I think that, upon the true construction of the Act of Parliament, they were not bound to obtain the opinion of the architect before taking out the summons. The Act, in order to prevent delay or improper expenditure, provides that it is "to be decided by the superintending architect for the Metropolitan Board of Works for the time being; and in case any building, structure, or erection be erected, or be begun to be erected or raised, without such consent, or contrary to the terms and conditions on which the same may have been granted, it shall be lawful for the vestry of the parish, or the board of works for the district in which such building or erection is situate, to cause to be made complaint thereof before a justice of the peace." It is proved that on the 26th or 27th of August the

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Plaintiff challenged them to raise the question, and they might immediately have taken out the summons; and though it might be open to the magistrate to say that he would not decide the question in the absence of the architect's certificate, it might have been obtained after the summons was taken out.

The question whether the vestry were in time turns upon the construction of the 107th section of the *Metropolis Local Management Acts Amendment Act.* It is a limitation clause, and substitutes the period of six months for the three months required by the previous Act. And it enacts "that no person shall be liable for the payment of any penalty or forfeiture under the said recited Acts, or this Act, or any bye-law made by virtue thereof for any offence made cognizable before a justice" (this is an offence cognizable before a justice), "unless the complaint respecting such offence shall have been made before such justice within six months next after the commission or discovery of such offence."

I am of opinion that the offence here was discovered on the 26th of August; because a communication was then made to the parish officers. Consequently the six months from that time expired on the 26th of February, and the summons was too late in that respect also.

Then it is admitted that the erection cannot be an injury to any human being. The only person who could have objected, the next door neighbour, prefers the conservatory to the wall which was there previously. Then, in spite of all remonstrances, the vestry make a peremptory order to demolish the building on the 3rd of August, 1870. To prevent this, a bill is hastily put on the file on the 2nd of August. And it shews the enormous value of the preventive powers of the Court that its interference was able to prevent the demolition. Then the bill has been, after various delays, brought to a hearing, simply because the parish officers have throughout insisted on doing what, in my opinion, would have been a monstrous wrong.

In my opinion they have been wrong in every step. There must be a perpetual injunction, and they must pay the costs of the suit.

Solicitors: Mr. *W. T. Boydell;* Messrs. *Capron, Dalton, & Hitchins.*

PEMBERTON *v.* BARNES.

V.-C. M.
1872
Jan. 17.

[1869 P. 87.]

Jurisdiction of Court—Chief Clerk—Master in Chancery Abolition Act (15 & 16 *Vict. c.* 80)*—Sale by Auction in Chambers before the Chief Clerk.*

The Court has power, since the passing of the *Master in Chancery Abolition Act*, to have a sale of real estate, directed to be sold under the Court, made by auction in Chambers before the Chief Clerk; and where all parties interested are *sui juris*, and before the Court, they may, if they think it expedient, have a sale effected in this manner. Where, however, there are parties not before the Court, or not *sui juris*, the duty is thrown upon the Court of determining what is the most beneficial mode of conducting the sale, and the fact of the power having fallen into disuse tending to shew that its exercise was in general inexpedient, the Court directed a sale by an auctioneer.

THIS was a motion that an estate which, by an order of the Lord Chancellor, dated the 14th of July, 1871, and made in a partition suit (1), had been directed to be sold with the approbation of the Judge, and with liberty to any of the Defendants to bid, might be sold before the Chief Clerk to the highest bidder at such time and place as might be approved by the Judge in Chambers.

The estate was held in undivided moieties, the Plaintiffs being trustees in fee simple of one moiety, and the Defendants, *James Barnes* and *Thomas Barnes*, being entitled to the other moiety for successive life estates, with power to acquire the fee simple. The moiety vested in the Plaintiffs was held by them on trust, subject to a small annuity, for a Mrs. *Kay* for life, with an absolute power for her to appoint by will, and in default of appointment, for her next of kin. Mrs. *Kay* had obtained leave to appear, and was represented at the hearing. The present application was made by the Defendants, and Mrs. *Kay* also concurred.

Mr. *Cotton*, Q.C., and Mr. *Speed*, for the Defendants:—

This application is to have the sale carried out by the Chief Clerk in the way sales used to be effected before the Master. The *Master in Chancery Abolition Act* (15 & 16 Vict. c. 80), s. 37, enacts that after the first day of Michaelmas term, 1852, all or

(1) Law Rep. 6 Ch. 685.

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any of the powers, authorities, and jurisdiction, given to the Masters in Ordinary by any Act or Acts then in force, may be exercised by the Master of the Rolls and Vice-Chancellors respectively. The terms of this clause include the power of selling, and this power has been in fact actually exercised: *Waterhouse* v. *Wilkinson* (1). That was, in fact, a sale by tender, but was treated as being identical in effect with a sale by auction, and the biddings were allowed to be opened on the ground of the identity. The Court may direct the Chief Clerk to sell, and he would do so in the same manner as the Master did formerly. The *Master in Chancery Abolition Act* received the Royal assent the day before the *Suitors in Chancery Relief Act* (15 & 16 Vict. c. 87), by the 42nd section of which the Masters and their clerks and appointees were exempted from taking out an auctioneer's licence. It is therefore to be inferred that the later Act was intended to be in force notwithstanding the change of procedure.

Mr. *Pearson*, Q.C., and Mr. *Rowcliffe*, for Mrs. *Kay*:—

The only object is to save heavy auctioneers' fees, and obtain the largest possible price for the estate; and we support the present application on that ground.

Mr. *Glasse*, Q.C., and Mr. *James Kaye*, for the Plaintiffs:—

There is no instance since the passing of the *Master in Chancery Abolition Act* of a direction for a sale by auction in Chambers. In *Waterhouse* v. *Wilkinson* there had been originally an attempt to sell by auction, and what took place before the Chief Clerk was a completion of that attempt. No Judge has since the Act presided over a sale by auction, but the uniform course has been for the Court to fix upon an auctioneer; one reason for this being that he is a man who must know how to conduct a sale. A sale is not, by sect. 26 of the *Master in Chancery Abolition Act*, or by Cons. Ord. xxxv., rule 1, stated as one of the things to be done in Chambers; and it does not necessarily follow that the Judge, acting through the Chief Clerk, had all the powers formerly possessed by the Masters. Lord *St. Leonards* treats the power as being non-existent: Vendors and Purchasers (2). More-

(1) 1 H. & M. 636. (2) 14th Ed. p. 98. 13 Ld 77

over the Chief Clerk is not exempted from the penalty for not taking out an auctioneer's licence, and nothing the Court could do would prevent an auctioneer from applying for the penalties for acting without a licence. The machinery even for a sale does not exist, the sale-room having been sold under sect. 51 of the *Master in Chancery Abolition Act.*

Mr. *Cotton*, in reply:—

Waterhouse v. *Wilkinson* (1) is a distinct authority shewing that the Chief Clerk may sell by auction in Chambers, and it becomes part of his duty to sell, if he is ordered to do so by the Judge. There is no real question of liability to a penalty. Sect. 51 of the *Master in Chancery Abolition Act* simply directs the sale of the Master's offices which had become useless. Lord *St. Leonards* merely states the fact of the disuse of the practice of selling in Chambers, not that the power had ceased.

SIR R. MALINS, V.C.:—

This is a suit for the partition of the *Tring Park* estate, the value of which may be safely assumed to be not less than £200,000. The parties before me may be considered as interested in equal moieties. The Lord Chancellor has directed, in lieu of partition, a sale of the estate, and the form of the order shews clearly that he contemplated a sale by auction. It was suggested before me in Chambers that the sale might be made by tender, but I stated my reasons for thinking that such a mode of selling was not expedient, and all parties now concur in desiring a sale by auction. But it appears that an auctioneer would require to be remunerated by a percentage which would amount to more than £1,000, and the Defendants have suggested that the auction should be conducted before my Chief Clerk. No person interested opposes this course; but the matter appeared to me to be of so much general importance that I would not decide the question in Chambers, but thought it should be argued by counsel in Court; and I am now able, quite satisfactorily to my mind, to decide it.

The first question is as to the power of the Court to direct a

(1) 1 H. & M. 636.

V.-C. M. 1872 PEMBERTON v. BARNES.

sale. It is quite certain that, though it was the ordinary practice before the passing of the *Master in Chancery Abolition Act* to sell estates before the Master, sales have not since been made before the Chief Clerks. The passage on that subject in Lord *St. Leonards'* work, which is merely a statement of fact, not an authority, is as follows (1): "The auctioneer is approved of upon evidence of his fitness; for estates are not sold before the Chief Clerk as they used to be before the Master, but in the general way by auction."

Now, although the practice of selling before the officer of the Court has ceased, it does not follow that the power to sell does not exist. Mr. *Glasse* has argued against the power mainly on the 42nd section of the 15 & 16 Vict. c. 87, which exempts Masters from taking out the licenses as auctioneers which are required by the Act of 8 & 9 Vict. c. 15. The Act of 15 & 16 Vict. c. 87, curiously enough, received the Royal assent the day after the *Master in Chancery Abolition Act*. Sect. 42 is as follows:—[His Honour then read the section, and continued:—] Nothing can be more clear than that the Master and the Master's clerks, and any person appointed by the Master, are exempted from the penalties for acting as an auctioneer without a licence. That can hardly be limited to the Master and the Master's officers, for what the Legislature had in view was sales by the Court of Chancery; and I think the fair meaning is, that sales by the Court were intended to be protected from licenses, and that the Master was named simply because he was the officer of the Court by whom, in fact, such sales were conducted; and although the Master is there named, I agree with Mr. *Cotton's* argument that the 36th section of the *Master in Chancery Abolition Act* applies to the case.

I have never before heard that anything whatever which could be done by a Master or a Master's clerk cannot now be done by the Judge with the aid of the Chief Clerk, or by the Chief Clerk under the authority of the Judge; and accordingly it was enacted by sect. 36 of the *Master in Chancery Abolition Act* that: "From and after the first day of Michaelmas term, 1852, all or any of the powers, authorities and jurisdiction given to the Masters in Ordinary of the said Court by any Act or Acts then in force may

(1) 14th Ed. p. 98. 13 Eq 77

be exercised by the Master of the Rolls and the Vice-Chancellors respectively;" and therefore it is quite clear now that the power given to the Masters by an Act then in force to sell estates under an order of the Court of Chancery, without being liable to auctioneers duty, "may be exercised by the Master of the Rolls and the Vice-Chancellor respectively;" and when the Chief Clerk is spoken of as selling or presiding at an auction, or receiving biddings, he is merely acting as the officer of the Vice-Chancellor. It is clear also, I think, from the report of *Waterhouse* v. *Wilkinson* (1), that that was the view of Vice-Chancellor *Wood*, and that he intended the estate to be sold by competition; which may be either by open bidding, that is, by auction properly so called, or by tender, which is also a kind of auction. He says (2): "The Chief Clerk declared the Plaintiff had made the higher offer; and the question is, whether that declaration constitutes this gentleman the purchaser conclusively, so as to oust the ordinary practice with reference to the opening of biddings upon a higher price being offered before a sale is finally confirmed. It appears that the Chief Clerk never treated this proceeding by sealed tenders as anything else than an auction under a more convenient form." I think that implies that it is competent for the Court to sell by auction before its own officer. I have therefore no doubt, both on authority and on the construction of the Acts of Parliament, that I have the power, if I think it expedient, to direct this or any other sale to be made before my Chief Clerk at my own Chambers or elsewhere, instead of by an auctioneer.

But it is important that a power which has fallen into disuse because, as I am satisfied, it was found that its exercise was not very expedient, should not be lightly revived, especially since the practice of opening biddings has been abolished by Act of Parliament; and I should be slow to revive it unless I saw that its revival would be for the benefit of all parties. And that leads me to consider the question of expediency. If I had before me all the parties interested, it would be for them to decide, and if they all wished to have the sale made before the Chief Clerk, I should not hesitate to adopt their view. I may assume that, as to the moiety which belongs to the *Barnes* family I have all the parties before

(1) 1 H. & M. 636. (2) 1 H. & M. 638.

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me, because, though it is limited to Dr. *Barnes* for life, with successive remainders to his son for life, and to his son's issue, and to his daughter for life and his daughter's issue, as Dr. *Barnes* has a power of appointment, I may practically consider him the owner of the fee. But Mrs. *Kay* is only tenant for life, with a testamentary power of appointment, and therefore, while she is alive, I can neither know to whom she will appoint, nor who will take if she dies intestate. Therefore I have not all parties before me, and no consent can remove the difficulty. I must, therefore, take the course which I think most expedient.

Now I think this estate is one which is likely to be eagerly competed for, and there is much force in Mr. *Glasse's* observation that an auctioneer knows where to send his particulars, and how to bring up bidders and to manage them better than any one else; and, considering that there must necessarily be some expense in selling, and that the expense of a sale under an auctioneer would be about £1000—just the amount of a single advance in an estate which will certainly produce £200,000—I cannot think it for the interest of the parties to depart from the usual course. If it were my own estate, I should have no hesitation in having it sold at the auction mart by an auctioneer. Therefore, though I am satisfied I have the power to do what is suggested, I think it more beneficial to the parties to have the sale conducted in the usual way.

The question was a very proper one to be brought before the Court, and the costs of all parties will be costs in the cause.

Solicitors: Mr. *J. Sheppard;* Mr. *Joseph Raw;* Messrs. *Wood, Street, & Hayter.*

ROLLINS *v.* HINKS.

V.-C. M.
1872
Jan. 25.

[1871 R. 164.]

Injunction—Validity of Patent—Restraining Publication—Necessity of following up Threats of Legal Proceedings—Scire facias to try the Validity of a Patent.

There is no presumption in law in favour of the validity of a patent, and therefore a patentee is not entitled to publish statements of his intention to institute legal proceedings, in order to deter persons from purchasing alleged infringements of his patent, if he has no *bonâ fide* intention to follow up his threats by taking such proceedings, and the Court will in such case restrain him from making such publication.

A person alleging the invalidity of a patent is not bound to assert his claim by *scire facias*, in order to establish his right to restrain the publication of statements by the patentee, threatening with legal proceedings persons buying articles of his manufacture alleged to be infringments of the patent.

THIS was a motion to restrain the Defendants from further publishing, or causing to be published or distributed, a certain advertisement and a circular.

The Plaintiff, in September, 1871, purchased a large number of lamps, manufactured with a burner made according to an American patent, dated the 20th of September, 1859, described in a volume of reports of the *United States* Patent Office, for 1859, which had been received at the Great Seal Patent Office in this country on the 31st of August, 1861, and called the "American Double Wick Lamp Burner," and about the same time he inserted the following advertisement in "*The Grocer*," a newspaper circulating amongst dealers in lamps:—

"Having arranged for an immediate supply of the American Double Wick Lamp Burner (as shewn in the accompanying drawing), I am prepared to receive orders for execution on arrival of stock. Competent judges have given a decided opinion that this is the best lamp burner ever brought out, and the demand is likely to be very large. It will burn all kinds of burning petroleum and paraffin oils, and also heavy oils, better than any other burner. Protection will be given against any threats of legal proceedings by persons claiming to have the exclusive right to manufacture double-wick burners. In corroboration of the above, I have sub-

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mitted all necessary documents to the editor of "*The Oil Trade Review*," to be used by him at his discretion.

"*John G. Rollins.*"

The Defendants were the holders of an English patent dated the 28th of March, 1865, for another invention, called the "Duplex Lamp," which also contained a double wick, and on the 26th of September their solicitors wrote as follows to the Plaintiff:—

"The attention of our clients, Messrs. *James Hinks & Son*, has been directed to your advertisement in "*The Grocer*," in which you state that you are prepared to receive orders for execution, on arrival of stock, for a double wick lamp-burner lamp, which appears to be an infringement of our clients' patent, and also that you are prepared to give protection against any threats of legal proceedings by persons claiming (as our clients do) to have the exclusive right to manufacture such burners.

"If this statement of yours is really honest, you will have no objection in complying with a request which we now make, that you will send us immediately, on the arrival of stock, one of the double wick lamp-burner lamps, for which we are prepared to pay in advance if required.

"We make this purchase, as we give you notice, simply for the purpose of having formal proof on which to found legal proceedings against you, and this proof if, as we have before observed, your advertisement means what it says, you will be anxious to give."

To this letter the Plaintiff replied to the effect that he would forward one of his lamps to the Defendants when his stock arrived.

In the number of "*The Grocer*" which came out on the 30th of September, 1871, the following appeared:—

"Duplex Lamps.

"To the Trade.

"Our attention has been directed to an announcement that an infringement of our patent is being made in *America* for sale in this country. Constant threats of these infringements have been held out to us for some time past, to induce us to make arrangements with our rivals, but have never yet been carried into effect by the actual sale in this country of any one of the infringements.

"Whenever an actual sale does occur, we shall at once proceed by injunction against the offender, and in all cases in which we can prove that this notice has come to their knowledge, shall also sue for damages.

"Yours truly,

"*James Hinks & Son.*

"*Crystal Lamp Works, Birmingham.*"

On the 3rd of October, 1871, the Plaintiff sent one of his lamp-burners to the Defendants' solicitors, together with a letter, in which he stated as follows:—

"Referring to your favour of the 26th ult., and my reply of the 27th, I have now the pleasure in handing you invoice of lamp-burner, which has been this day forwarded to your address.

"I trust you will commence action at once."

The Defendants' advertisement in "*The Grocer*" was repeated on several occasions, and they soon afterwards printed and commenced circulating through the post the following circular:—

"Important Notice.

"Duplex Lamp.

"To the Lamp Trade.

"Dear Sir,—Our attention has been directed to an announcement that an infringement of our patent is being made in *America* for sale in this country. Constant threats of these infringements have been held out to us for some time past, to induce us to make arrangements with our rivals, but have never yet been carried into effect by the actual public sale in this country of any one of these infringements.

"To prevent the possibility of your being unwittingly involved in any difficulty, we think it only right to state that dealers in lamps and shopkeepers generally are hereby specially warned that on the discovery of the public sale of any of the said burners, made in infringement, we shall at once proceed by injunction against the offender, and in all cases in which we can prove that this notice has come to their knowledge, shall also sue for damages.

"Yours respectfully,

"*James Hinks & Son.*

"*Crystal Lamp Works, Birmingham.*"

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A correspondence then took place between the solicitors for the respective parties, the Plaintiff's solicitors urging that the Defendants should either withdraw the advertisement and the circulars, or immediately commence proceedings against them, and the Defendants' solicitors maintaining their right to select their own time for commencing proceedings. In the course of this correspondence the Plaintiff had intimated his belief that both the patents had been anticipated, and that both parties were interested in not raising a contest.

It appeared from the Plaintiff's evidence that his usual customers declined to buy his lamps, in consequence of the advertisement and the circulars, even though he offered to indemnify them against any proceedings on the part of the Defendants.

He accordingly filed the bill, and now moved for an injunction in terms of the first paragraph of the prayer.

Mr. *Glasse*, Q.C., Mr. *Theodore Aston*, and Mr. *Ingle Joyce*, for the Plaintiff:—

The Court has jurisdiction to restrain the publication of any document tending to the destruction of professional reputation by which property is acquired: *Dixon* v. *Holden* (1); and a man has no right to go about asserting in general terms that another person is infringing his patent, without being prepared to justify such an assertion: *Wren* v. *Weild* (2). He has no right to threaten intending purchasers with legal proceedings without meaning to follow up his threats.

[The VICE-CHANCELLOR:—I have already, I think, decided in *Dalziel* v. *Railway Carriage and Steamboat Gaslight Company*, that a man has no right to go about boasting of a patent, and not attempt by action to try its validity.

It appeared, on inquiry, that the case referred to had been compromised after the Vice-Chancellor had expressed an opinion to the effect stated.]

The initiative was necessarily thrown upon the Plaintiff by the course the Defendants took, and on a proceeding by *scire facias* by the Plaintiff the question could not be effectually tried. It is a

(1) Law Rep. 7 Eq. 488. (2) Law Rep. 4 Q. B. 213.

process which has never been acted on since the *Patent Law Amendment Act*, 1852 (15 & 16 Vict. c. 83), and it would be quite open to the Defendants to defeat the process by merely shewing some difference between the articles in question; though it might be, at the same time, that his claim would cover both articles.

Mr. *Cotton*, Q.C., and Mr. *Lawson*, for the Defendants:—

The Defendants have a grant from the Crown by patent, which they have held for seven years unchallenged, and it is not for them to go into a Court to establish their rights except at such times as they choose; and they have a perfect right to warn others against infringing their patent. There is no difficulty in trying the validity of the patent on a *scire facias*, and the advertisement and circular are not open to any legal objection. It leaves the Defendants quite free to commence an action when they please. The circular, moreover, is in general terms, and there may be other parties who are infringing the patent. Moreover, the Plaintiff is precluded from relief by his suggestion to collude with the Plaintiff in treating the patents as being both valid when he believed them to be invalid.

Mr. *Glasse*, who was only called upon to reply as regarded the letter, said that it only meant that the Plaintiff did not wish to contest the matter without necessity.

Sir R. Malins, V.C.:—

The Plaintiff, as I understand, is an American citizen, domiciled in this country for the purpose of his business, which is that of an importer of American articles. The Defendants carry on business at *Birmingham*, as lamp manufacturers, and in the year 1865 they obtained a patent for an improved lamp-burner, which they, of course, contend is a valid patent. It appears that in 1861 a patent was taken out in *America* for a lamp-burner, certainly very similar in form and description to that of the Defendants. The Plaintiff imported a large quantity of the American lamp-burners, the patent for which had been published in *England*, sufficiently to affect the Defendants' patent, if it is of the same character, or

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unless the Defendants' is an improvement upon the former one. The quantity imported being large, the fact came to the knowledge of the Defendants, who accordingly instructed their solicitors to write to the Plaintiff in the following terms:—[His Honour read the letter, above mentioned, of the 26th of September, and continued:—] I read that letter as an expression of intention on the part of the Defendants to take the earliest opportunity, at law or equity, as they might be advised, of preventing the sale of what they considered to be an infringement of their patent. To that a reply was sent. [His Honour here read the Plaintiff's letter in reply, and continued:—] Nothing could have been fairer up to this point than the conduct of both parties: the Defendants were anxious to restrain an infringement of what they believed was their *bonâ fide* patent, and the Plaintiff was desirous to have the question decided immediately. However, the Defendants have not brought, and will not bring, an action. Mr. *Cotton* only says that they will take whatever steps they may be advised in their own good time; but this refraining from bringing an action, after their threat to do so, is of itself strong evidence of doubt on their part. Mr. *Lawson* suggested that they wanted to choose their Defendant, and they did not like the Plaintiff; but that was only an afterthought. [His Honour then commented on the facts, and continued:—] Then, do the Defendants believe in the validity of their patent? If they do, these circulars may be issued in good faith; but if not, I consider them so totally wanting in good faith as to approach closely to fraud. The Plaintiff would, in all probability, be carrying on a large business in these articles if it were not for the circulars; and the question arises whether his trade is to be destroyed by men who, while alleging their right to do so under their patent, will not bring the action which they have been threatening ever since October, but which they will not even undertake to bring within a limited time. This is not the first time a case of this kind has arisen. There was the case of *Dixon* v. *Holden* (1), where the Plaintiff had been informed that a notice would be published in which he was alluded to as being a solvent partner in an insolvent firm, of which he was in fact not a partner at all, and on the Defendants contending for the right to publish

(1) Law Rep. 7 Eq. 488.

the advertisement, I granted an injunction to restrain the publication. My decision was not appealed from, and I am satisfied that it was correct. I there said (1): "In the decision I arrive at I beg to be understood as laying down that this Court has jurisdiction to prevent the publication of any letter, advertisement, or other document, which, if permitted to go on, would have the effect of destroying the property of another person, whether that consists of tangible or intangible property—whether it consists of money or reputation." If the Defendants had been acting in good faith, and there were any reason for delay in commencing proceedings, they might have stated it; but I have not heard a plausible excuse alleged. Then the difference appears to be very slight between the two articles, and I am by no means favourably impressed with the validity of the Defendants' patent; and I am bound to come to the conclusion that the Defendants are not very favourably impressed with it themselves, for, of course, as soon as they could once establish that validity they would have a perfect right to issue these circulars throughout the country. The contention of the Defendants is, that a patent is *primâ facie* good. But this cannot be so, for the rule is, that where letters-patent have been recently granted, an injunction will not be granted till the right has been established. The necessity for this rule appears from such cases as *Rushton* v. *Crawley* (2). If, however, a patent is of ten or a dozen years' standing, the rule may be different. If this were not so, a man, by taking out a patent for something old, might issue circulars to prevent another man from selling an article which was sold twenty years ago—before the patent was taken out. That, in my opinion, would not be proper. The result, therefore, is, that the Defendants must either establish their patent or cease to issue these notices; they must not, because they have got the colourable protection of a patent, issue circulars which have the effect of intimidating the public, and thereby totally destroying the trade of the Plaintiff. As to the point with regard to the Plaintiff applying for a *scire facias* to rescind the patent, I think there are so many difficulties in his way in that mode of proceeding that he ought not to be put to that remedy, but that the Defendants are bound to do what they have threatened. I am

(1) Law Rep. 7 Eq. 494. (2) Law Rep. 10 Eq. 522.

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of opinion, therefore, that until they have established the validity of their patent, they must be restrained from issuing these circulars and advertisements. I understand that the Plaintiff is willing to admit that the articles he has sold are covered by the claim in the Defendants' specification, and the order will be prefaced with a statement to that effect.

Solicitors: Messrs. *Ingle, Cooper, & Holmes;* Messrs. *Burton, Yeates, & Hart.*

V.-C. M. 1871 *Dec.* 21.

WILSON *v.* FERRAND.

[1871 W. 219.]

Motion to stay Proceedings pending Litigation in France—French Contract.

2 Ch D 201

A., an Englishman domiciled in *France*, entered into a contract in *France* with *B.*, a Frenchman, for carrying out jointly certain mercantile undertakings. In the course of the transactions large sums of money came into the hands of *C.* and *D.*, foreign merchants in business in *London*. *A.* filed a bill against *B.*, *C.*, and *D.*, alleging that, under the contract with *B.*, he was entitled to participate in the profits of the undartaking, and praying for an account from *C.* and *D.* of the money in their hands, and that they might be restrained from handing it over to *B.* The Defendants moved to stay all further proceedings in the suit pending certain proceedings in the French Courts instituted by *A.* against *B.*, in which a construction would be put upon the French contract:—

Held, that there being portions of the relief sought, as to which the Defendants were bound to answer, the motion, which was in the nature of a demurrer, could not be sustained, and must be refused with costs.

HE bill, which was filed in October, 1871, stated as follows:—

The Plaintiff was a merchant and commission agent, and had resided in *France* for many years. In July, 1870, he was in *Paris*, and was endeavouring to obtain a commission from the French Government for the purchase of stores and provisions; he there met the Defendant *Emile Ferrand*, with whom he had been intimately acquainted for many years, and to whom he had frequently rendered considerable pecuniary and other services. The Defendant had recently been unsuccessful as a sugar baker, and was then penniless. The Plaintiff explained to the Defendant *Ferrand* the object he had in view with regard to obtaining

commissions from the Government, and the Defendant represented that he was personally acquainted with several of the French ministers, and that his services would materially assist the Plaintiff in his plans, while the Plaintiff's business connections with *England* would enable him to carry out these commissions in a satisfactory manner. It was then agreed that the Defendant should assist the Plaintiff by all means in his power to obtain the proposed business, and that any commissions the Plaintiff or Defendant might succeed in obtaining from the French Government should be divided between them in the following proportions, viz.: that the Plaintiff should receive 75 per cent. and the Defendant 25 per cent. of such commissions. In pursuance of the agreement between the Plaintiff and Defendant several orders for the purchase of arms and provisions were obtained from the French Government by the Defendant on behalf of himself and the Plaintiff.

The Defendants *Alfred de Coulon* and *A. H. Berthoud* were foreigners, and were carrying on business in *London* under the firm of *De Coulon, Berthoud, & Co.* The Defendant *Ferrand* had entered into negotiations with *De Coulon & Co.* for the carrying out of the contracts obtained from the French Government by *Ferrand,* and a large amount had been paid to them by such Government. The Defendants *De Coulon & Co.* had paid over considerable sums of money to *Ferrand* for commissions payable to him and the Plaintiff in respect of the aforesaid contracts; but they still had in their hands large sums of money representing commissions paid by the French Government in respect of the said contracts, which belonged to the Plaintiff. Part of these sums they had invested in consols, in *London,* in their own names and in the name of a M. *Langlois,* who had acted as agent for *E. Ferrand,* and they were, in fact, trustees of such sums for the Plaintiff or the Defendant *Ferrand.*

The Defendant *Ferrand* repudiated all liability to account to the Plaintiff for any share in these commissions, and he pretended that the contracts were entirely negotiated by himself, and on his own account, and that he alone was entitled to retain the same. The Plaintiff, on the other hand, alleged that the whole of the contracts were negotiated by *Ferrand* for account of himself and

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the Plaintiff, and were part of the aforesaid transactions which the Plaintiff and *Ferrand* agreed to undertake for their joint benefit. The whole amount paid by the French Government in respect of all the contracts negotiated by the Defendant *Ferrand* was believed to be about two millions sterling, and the amount of commission paid to or claimed by *Ferrand*, and payable to him and the persons with whom he had shared the same, amounted to several hundred thousand pounds. The Defendants had in their possession, custody, or power the originals and copies of all letters and correspondence which had passed in relation to the contracts which had been entered into; and from the contents of these letters and correspondence, and which the Defendants ought to set forth, it would fully appear that the Plaintiff was jointly interested with the Defendant *Ferrand* in obtaining the contracts and in the commission which the Defendants had received or claimed to receive thereon.

The bill prayed a declaration that all contracts for the supply of goods, stores, and provisions to or on behalf of the French Government effected by *Ferrand*, and in respect of which he was, or claimed to be, entitled to any commission, were effected by him for the joint benefit of the Plaintiff and himself, and that such commission belonged to the Plaintiff and himself in the proportion of 75 per cent. to the Plaintiff and 25 per cent. to the Defendant *Ferrand*. That an account might be taken of all sums received by the Defendant *Ferrand* in respect of such commissions, and that he might be ordered to repay to the Plaintiff three-fourths of such sums; that an account might be taken of all moneys received by *De Coulon & Co.* in respect of such commission, and of all sums paid by them in respect thereof, and that out of the balance now in their hands the amount payable to the Plaintiff in respect of the said commission might be paid to the Plaintiff; and that in the meantime *De Coulon & Co.* might be restrained by injunction from paying any sum of money in their hands and representing commission on the aforesaid contracts to *Ferrand*, and that the same might be properly secured for the benefit of the Plaintiff.

A motion was now made on behalf of the Defendants, that all further proceedings in this cause might be stayed until seven days after the determination of the legal proceedings instituted by the

Plaintiff against the Defendant *Ferrand*, and now pending before the civil tribunal in *France*.

There was evidence that the Plaintiff had instituted proceedings in *Paris* against the Defendant *Ferrand*, for the same accounts as those prayed for in this suit, on the 17th of August, 1871; that the Defendant *Ferrand* pleaded to the suit on the 23rd of August; that on the last-mentioned day the Defendant *Ferrand* filed a cross suit against the Plaintiff, which was supplemented by a further plaint of *Ferrand* on the 5th of September. These proceedings were still pending.

Mr. *Pearson*, Q.C., and Mr. *Davey*, for the Defendants:—

This is a bill to have a construction put upon a contract entered into in *France* between a Frenchman and an Englishman domiciled in *France*. Proceedings have already been instituted in *France* which will settle this question. The foreign Court is the proper tribunal to try the question, which is one of French law. This Court can have no knowledge of what that law is unless through the evidence of foreign lawyers, and the Defendant *Ferrand*, who is the only party to the contract with the Plaintiff, is now in *France*, where the suit is proceeding. The Defendants *De Coulon & Co.*, although resident in *England*, are also foreigners; against them the relief prayed is an account of moneys received by them on another person's account, and that the amount due to the Plaintiff may be paid to him. These Defendants know nothing of the alleged contract; their dealings have been with *Ferrand*, and now they are told by the Plaintiff that he is a party to that contract, and is the principal person entitled to the money received by them, being entitled to three-fourths of the amount. It is impossible for this Court to put a construction upon the contract, and the convenience of all parties will be served by an order to stay any further proceedings in this suit until after the legal proceedings instituted by the Plaintiff against *Ferrand* in the civil tribunal of *France* shall have been brought to a termination. It would be an act of oppression if this Court were to act upon its own view of a foreign contract when the foreign Court is about to decide the question between the parties. In *Ostell* v. *Le Page* (1), and on appeal (2),

(1) 5 De G. & Sm. 95. (2) 2 D. M. & G. 892.

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the Court overruled a plea of a pending suit in *India*. The Vice-Chancellor, however, intimated that if two suits for the same object were pending in Courts of concurrent jurisdiction, then the second suit would be vexatious, and the proper course would be to apply to stay proceedings in the second suit. But in *Jones* v. *Geddes* (1) an injunction was refused to restrain a party resident in *England* from prosecuting a suit in the Court of Sessions in *Scotland*, because the question, upon the whole, might be more conveniently litigated, and with a more conclusive result, there than here. This shews that the convenience of the tribunal and completeness of the relief is a matter of the greatest importance, and on that ground the present motion should be allowed.

[They also cited *Venning* v. *Loyd* (2).]

Mr. *Glasse*, Q.C., and Mr. *Robinson* for the Plaintiff, were not called upon.

SIR R. MALINS, V.C.:—

This is a most unusual application. It is a motion that I should stay all proceedings in the cause, and put an end to the suit; that I am in fact to decide that none of the Defendants are bound to answer a single interrogatory to the bill. Now it requires a very clear case to sustain such a motion, and I never heard an application more unjustifiable than this. The allegation is that there are large sums of money in which the Plaintiff is entitled to participate; but the bill only asks an account as to the particular sums which have found their way into the hands of the Defendants Messrs. *De Coulon & Co.*

The Defendants demur to the bill on the ground of convenience; then where is the convenience of this course?—that I am to stay all proceedings in the suit when it is plain that the object of the Defendants *De Coulon & Co.* is to play into the hands of *Ferrand*. These men are stakeholders, and the present motion is in the nature of a demurrer, and if any part of the bill requires an answer, the demurrer must fail. There may be ninety-nine interrogatories which the Defendants are not bound to answer; yet if there is one upon which the Plaintiff is entitled to relief, the demurrer cannot

(1) 1 Ph. 724. (2) 1 D. F. & J. 193.

be sustained. So, in this case, there may be many of the interrogatories to which the Plaintiff cannot demand an answer, and which the Defendants are not legally bound to answer; but if there is any one question which they ought to answer, they cannot avoid doing so. What then becomes of the question of convenience? It is impossible for me to say when the proceedings instituted in the French Courts may be adjudicated upon, and I am asked that this suit may be stayed in the meantime, and that the Defendants may be exempted from putting in an answer. I must therefore look into the allegations in the bill, which for this purpose must be taken to be true, to ascertain whether there is any portion requiring an answer. Now, there is an interrogatory which, I think, the Defendants are, at any rate, bound to answer, "Whether the Defendants *De Coulon & Co.* had not, and whether they have not now, a large sum of money in their hands, representing commissions paid by the French Government in respect of the said contracts?"

Suppose they say they have a large sum of money in their hands, then the question arises whether that money ought not to be brought into Court for safe custody. On principle this motion is totally unjustifiable and unsustainable, and it appears to me that the only object of the Defendants *De Coulon & Co.* is to help *Ferrand* as much as they can. They have been casting about to see how they could avoid giving an answer, and this is the only object of the motion.

I was told there were authorities which were conclusive upon the point; but upon looking at the cases cited I do not find one that is applicable to the circumstances of this case. Take the case of *Ostell* v. *Le Page* (1): the Plaintiff and Defendant had carried on business in partnership in *India* and in *England;* the Plaintiff resided in *England*, and the Defendant in *India*; the Plaintiff filed a bill in *Calcutta* against the Defendant for an account, and for an injunction and receiver. Pending that suit, the Defendant left *India* and came to reside permanently in this country; the bill filed in *India* was taken *pro confesso*, and a decree was made referring it to the Master to take an account. The Plaintiff then filed a bill in this country, alleging that by reason of the absence of the Defendant from *India* the suit there could not be prosecuted,

(1) 5 De G. & Sm. 95; 2 D. M. & G. 892.

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and praying relief here similar to that which was sought in the suit in *India*. The Defendant answered such parts of the bill as sought discovery of documents, but pleaded the existence of a decree of the Court in *India*, and the pendency of the proceedings before the Master there in bar of the substantial part of the Plaintiff's bill. That was a very strong case; but still the plea was overruled, and the decision was confirmed upon appeal. That was quite as much a foreign Court as this is. Here I am asked to stay proceedings on account of the pendency of a suit in *France*, when I have the decision of the Court of appeal in the case relied upon, which, instead of being in favour of the Defendants, is against them.

Then there is the case of *Elliott* v. *Lord Minto* (1). The Petitioner, who was the heir under a settlement made by *W. Elliott*, of a Scotch estate, filed a bill to have his estate exonerated from a heritable bond by the application of personal estate in *England*. The Vice-Chancellor said the question must be determined like every other question respecting real estate, by the law of the country where the real estate was situate, and could not depend upon the law of the country where the personal estate happened locally to be; that all this Court could do would be to refer it to the Master to inquire what was the law of *Scotland* to be applied to the case, which could not be conveniently done in a complex case of equitable circumstances; and as it appeared that a suit and cross suit were already commenced in *Scotland*, the Court ordered the case to stand adjourned till the determination there.

That has no application to this case. There there was one Plaintiff and one Defendant. Here the object is to obtain discovery; in the other case the circumstances apply to a different state of things altogether.

This Plaintiff is entitled to an answer if he can get it from these Defendants, who are merchants carrying on business in this country.

I must refuse the motion with costs.

Solicitor for the Plaintiff: Mr. *Kearsey*.

Solicitors for the Defendants: Messrs. *Druce, Sons, & Jackson*.

(1) 6 Mad. 16.

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V.-C. B.

1872

Jan. 23, 24.

[1870 G. 16.]

Marriage Act—4 *Geo.* 4, *c.* 76, *s.* 22—*Undue Publication of Banns*—*Proof required of concurrence "knowingly and wilfully" by both Parties*—*Evidence*—*Costs of Trustee.*

A marriage solemnized after an undue publication of banns will not be held null and void under the provisions of the *Marriage Act* of 1823, unless it be shewn that both parties "knowingly and wilfully" concurred in such undue publication.

Where an intending husband, then a minor, and desiring to have a secret marriage, gave instructions for the publication of banns, and in such instructions omitted two of his own Christian names and one of the Christian names of his intended wife (also a minor), and the names were entered with such omissions in the register of banns—there being no evidence of how the banns were actually published—and the names were, after the ceremony, signed by the respective parties, with the same omissions, in the register, there being no further evidence besides that of the husband, who deposed that he omitted the names, not thinking or believing he was acting contrary to law, and for brevity's sake only, and the marriage having been reputed good for more than thirty years:—

Held, that the husband was not proved to have committed any offence against the statute.

The husband deposed that, prior to the marriage, the intended wife neither directly nor indirectly took any step towards the publication of the banns, but left the matter entirely to him. There was no evidence of knowledge on her part beyond her signature of the marriage register with the omission above mentioned, that not being her usual form of signature. She being dead, and the marriage having been reputed good throughout her life—that is to say, for upwards of twenty-four years:—

Held, that the Court could not impute to the wife knowledge of the omission of the name in the instructions for publication of banns.

Costs disallowed to a trustee severing in proceedings from his co-trustee.

MOTION FOR DECREE.

Sarah Broadhurst, spinster, by her will, dated the 16th of May, 1840, bequeathed all her shares in the *Lambeth Waterworks* to *Thomas Robert Mawley* upon trust to pay the yearly income unto her nephew, *Louis Armand de Grenier*, during his life, and after his decease to his wife, *Adelaide Augustine de Grenier*, for her life, and after her decease unto testatrix's great-niece, *Georgiana Adelaide Harvey* (daughter of *Robert Valentine Harvey*, of the Custom

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House, *London*), during her life for her separate use; and the testatrix declared that after her decease the trust premises should be in trust for all and every the children and child of her said great-niece who, being a son or sons, should attain the age of twenty-one years, and who, being a daughter or daughters, should attain such age, or should respectively marry under that age, equally to be divided between such children, if more than one, as tenants in common; and if there should be but one such child, then the whole for that one. And the testatrix, after appointing the said *Thomas Robert Mawley* her executor, gave all the residue and remainder of her estates and effects of every description unto her nephew, *Louis Armand de Grenier.*

The testatrix died in 1841, and on the 23rd of February in that year her will was duly proved by *T. R. Mawley.*

On the 5th of July, 1841, *Georgiana Adelaide Harvey* went through the ceremony of marriage with the Plaintiff, *William Frederick Louis Gompertz.*

On the 6th of March, 1844, *T. R. Mawley* died, having by will appointed the Defendant *Henry Kensit* his executor, by whom his will was duly proved.

On the 25th of March, 1844, *Louis Armand de Grenier* died, having appointed the same *Henry Kensit* his executor.

On the 9th of January, 1866, *Amy Georgiana*, only child of Mr. and Mrs. *Gompertz*, married *Stephen Spring*, and by a settlement executed a few days previously, she being then of age, her reversionary interest in the waterworks shares, expectant on the death of Mrs. *de Grenier*, was settled, the trustees of the settlement being the Plaintiff, her father, and the Defendant *Oliver Murphy.*

On the 17th of January, 1866, *Georgiana Adelaide Gompertz* died, leaving surviving her the Plaintiff, her husband, and Mrs. *Spring*, her only issue.

On the 15th of March, 1869, Mrs. *de Grenier*, the tenant for life, died.

This bill was filed on the 15th of February, 1870, by *W. F. L. Gompertz* against *Henry Kensit* and *Oliver Murphy*, stating the above facts, and that, upon the death of Mrs. *de Grenier*, the Plaintiff and the Defendant *Murphy* applied to the Defendant *Henry Kensit* to transfer the waterworks shares to them, and that "he was

about to do so when he discovered" that the marriage of the Plaintiff with his late wife "was solemnized between them by the names of *Frederick Gompertz* and *Adelaide Harvey*, instead of by their respective full names of *William Frederick Lewis Gompertz* and *Georgiana Adelaide Harvey*, and in consequence thereof declined" to transfer the shares to the Plaintiff, except under the order of the Court.

The bill then alleged that "the fact is, that the marriage was so solemnized, but the omission of the aforesaid Christian names was not with any *mala fides*, or with any wrong meaning or improper motive; but such omission was by accident and mistake, and was not wilfully made or done by either of the parties, or any other person, or even with the knowledge of the late *Georgiana Adelaide Gompertz*;" also that the marriage was ever afterwards recognised by the parents and guardian of *W. F. L. Gompertz* and *G. A. Harvey;* that they lived together till the death of the latter as husband and wife; that no question, during Mrs. *Gompertz's* life or afterwards, until the transfer was about to be made, was ever raised as to the validity of the marriage; and that the Plaintiff and the Defendant *Murphy* submitted that the marriage was a good and valid marriage, and at all events could not, after the death of one of the parties, be questioned or invalidated.

The bill then alleged that the Defendant *Henry Kensit*, as executor of the testatrix's residuary legatee, submitted that the marriage was invalid, and that as in that case the said *Georgiana Adelaide Harvey* died without issue, he, as such representative, was entitled to the shares.

The bill also alleged that the Defendant *Oliver Murphy*, as such co-trustee and assign with the Plaintiff as aforesaid, had been requested to concur with the Plaintiff in taking the present proceedings, but refused to do so, and had consequently been made a Defendant.

The bill prayed that the unperformed trusts of the will might be carried into execution under the direction of the Court; that it might be ascertained and declared who was entitled to the shares and the income since the death of Mrs. *de Grenier;* and that such shares and income might be transferred and paid accordingly; and for an account of the income.

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On the 8th of April, 1870, the Defendant *Murphy* filed an answer, in which he admitted, though having no personal knowledge thereof, the statements in the bill, except that an application was made by him as therein alleged. He said he did not submit that the marriage was good and valid. He admitted his co-trusteeship, and that he had been requested to join the Plaintiff, and said that he refused so to do, or to take any proceedings in Chancery in respect thereof, or to allow his name to be used as Plaintiff, because he was and still was "unacquainted with the facts alleged" by the bill. He further said he was a clergyman of the Roman Catholic Church, that he was always ready to discharge the duties of his trusteeship, but that, being a comparative stranger to the parties, and "wholly ignorant of all the matters therein stated or mentioned," he was unwilling to assume the responsibility of filing a bill.

On the 20th of April, 1870, the Defendant *Henry Kensit* filed his answer, in which he said that, on being applied to for transfer of the shares, he expressed his willingness, on receiving evidence of the applicants' title; whereupon the Plaintiff referred him to *St. Pancras* Church, from the incumbent of which he obtained a certified copy of the register of the marriage. From this it appeared that the names of the parties married were *Frederick Gompertz* and *Adelaide Harvey*, both "minors," he residing at "*Pitt Street*," and she at "Do."

Defendant also obtained a copy of the entry in the register of banns, in which the parties were described in like manner, each by two names only.

He further said that he found, in a copy of the *Morning Post* of the 17th of July, 1841, a notice of the marriage, in which all the Christian names of both parties were given. He believed that Miss *Harvey* was at the time an orphan, and said she was residing under the care of *Robert Thomas Mawley*, her step-grandfather, and, he believed, her only living relative, except her maternal uncle, *Louis Armand de Grenier*. She had been maintained and educated by Mr. *Mawley*, with whom the defendant was very intimate. Mr. *Mawley* always called her *Georgiana*, never *Adelaide*; and Defendant believed she herself always used the former name and not the latter. Defendant never heard her called *Adelaide*,

and believed that the name "was, in fact, dormant." He exhibited several letters of the Plaintiff, and several receipts signed by him and by Miss *Harvey*. None of them were signed either in the name of "*Frederick Gompertz*" or "*Adelaide Harvey*."

Defendant said that shortly after the marriage he heard of it from Mr. *Mawley*, who told him that the Plaintiff had run away with Miss *Harvey*, who was then about eighteen or nineteen, from the place where Mr. *Mawley* had placed her, and had married her without his consent. Mr. *Mawley* "then, and ever afterwards," expressed himself much displeased thereat. He believed Miss *Harvey* was not then living, and had never lived, in *Pitt Street*.

He alleged that the marriage was a clandestine marriage, and solemnized without due publication of banns; that he believed the said undue publication was knowingly and wilfully made by the Plaintiff and Miss *Harvey*, and with a view to conceal the marriage; that the marriage was null and void to all intents and purposes; and that the trustees had no title to the shares; but said he was ready and willing to transfer the shares upon their establishing their title.

Defendant admitted that the parties always lived together, and that he, in ignorance of the facts, treated them as husband and wife. He believed the facts had been now, for the first time, discovered.

The Plaintiff, in an affidavit filed on the 26th of July, 1870, said that in 1841 he became acquainted with Miss *Harvey* at a dinner party at his father's house, to which she and a friend of hers named *Hutchinson*, at whose house, in *Upper Montague Street*, she was staying on a visit, were, with Mr. *Mawley's* consent, invited by Plaintiff's mother. Plaintiff and she afterwards met together several times, and he made her an offer of marriage, which she accepted, and he thereupon "arranged with her to do all that was requisite with reference to the publication of banns and whatever else was necessary to be done," and that she "neither directly nor indirectly made any suggestion or took the most remote step as to the publication of banns or otherwise," but left the matter entirely to him. He was then nineteen, and she about eighteen or nineteen. The banns were published by Plaintiff's sole direction and instructions,

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and when he gave such instructions for the publication of banns "in the names by which" they were afterwards married, he did so, "not considering or either thinking or believing" that he was "doing anything wrong or acting contrary to law." Believed he gave the lady's address as of *Tottenham Street* (in which street Mr. *Mawley* lived), and presumed the parish clerk made a mistake. Plaintiff admitted that the marriage was a secret marriage, witnessed only by the pew-opener and another person.

He further said: "I deny that I left out .... the other names of myself or wife with any fraudulent intent to avoid the discovery of the said intended marriage, but I did so for brevity's sake only; and I say that, so far from concealment of names, I was only too anxious to have a good and valid marriage."

He then proceeded to depose that within two hours of the marriage he and his wife went to Mr. *Mawley's* house, who was very angry at first, but afterwards forgave them both. Afterwards Mr. *Mawley* "perused the marriage certificate, and noticed that we had not married in our full names, whereupon I said if it was not a perfectly good marriage, we would go through the ceremony again. He thereupon said he considered it sufficient." Mr. *Mawley*, however, wished the notice in the newspapers to appear with the full names; and this was caused to be done.

In a further affidavit the Defendant *Kensit* said he believed that the Plaintiff, immediately before the marriage, was living with his parents in *Chester Square*, and not in *Pitt Street*. He believed also that Miss *Harvey* was not on a visit at Miss *Hutchinson's*, but was permanently residing there by the desire and at the cost of Mr. *Mawley*.

Mr. *Kay*, Q.C., and Mr. *T. A. Roberts*, for the Plaintiff:—

The question turns upon the 22nd section of the *Marriage Act* of 1823 (4 Geo. 4, c. 76) (1). The Act does not say that all the names of the parties must be published when the banns are published; but it does (sect. 26) provide against a marriage being

(1) Sect. 22:—"Provided always, and be it further enacted, that if any persons shall knowingly and wilfully intermarry ... without due publication of banns ... the marriages of such persons shall be null and void, to all intents and purposes whatsoever."

invalidated through non-residence of the parties in the parishes wherein the banns were published (1).

In order to render a marriage invalid under the 22nd section, it must have been solemnized with a knowledge by both parties of the undue publication: *Rex* v. *Inhabitants of Wroxton* (2).

A case that will be cited on the other side, to shew that where one party only gave the false instructions, the other party will be presumed to have had previous knowledge of, and to have joined in, the misrepresentation, is *Tongue* v. *Allen* (3), which was affirmed on appeal under the name of *Tongue* v. *Tongue* (4). But the distinction is, that in that case the Court treated it as quite clear that the woman "knowingly and wilfully" gave the incorrect information. Here the evidence is the other way.

All evidence as to erroneous description of residence is excluded by the statute (sect. 26).

The Defendant *Kensit's* error has been this: he supposes that a marriage, which has been solemnized, and acknowledged by everybody connected with the parties throughout its whole continuance, is, after the death of one of the parties, to be disposed of, like the signature to a bill of exchange, by proof of erroneous description. He has forgotten that the presumption in favour of a valid marriage is the strongest known to the law: *Piers* v. *Piers* (5).

To invalidate the marriage, the misrepresentation must have been "knowingly and wilfully" made. As to the meaning of these words, Lord *Tenterden*, in *Meirelles* v. *Banning* (6), says they "must be taken to denote acts done with a conscious mind that the party is doing wrong." The evidence disproves any guilty knowledge on the part of either. Both were desirous that they should be lawfully married. No doubt they wanted to have a secret marriage, and if the Court should go the length of holding,

(1) Sect. 26:—"Provided always, and be it further enacted, that after the solemnization of any marriage under a publication of banns, it shall not be necessary in support of such marriage to give any proof of the actual dwelling of the parties in the respective parishes or chapelries wherein the banns of matrimony were published . . . nor shall any evidence . . . be received to prove the contrary in any suit touching the validity of such marriage."

(2) 4 B. & Ad. 640.

(3) 1 Curt. 38.

(4) 1 Moo. P. C. 90.

(5) 2 H. L. C. 331.

(6) 2 B. & Ad. 909, 915.

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on the evidence, that the husband did what he did in order to conceal all traces of the marriage, it is still necessary to shew the complicity of the wife.

There is no direct evidence to shew in what words the banns actually were published.

Mr. *Amphlett*, Q.C., and Mr. *Cecil Russell*, for the Defendant *Kensit* :—

This was an illegal marriage. No doubt there is a strong presumption in favour of marriage, but it may be rebutted by undisputed facts. In this instance the banns were published and the ceremony performed with suppression of the ordinary name of the lady, and of two of the husband's names.

No doubt "wilful and knowing" concealment by both parties must be shewn; but it has been argued as if it were necessary to shew wilful knowledge of wrong-doing. All that the Act requires is "wilful and knowing" misdescription. The *dictum* in *Meirelles* v. *Banning* (1) accordingly has no application.

As to the necessity of proving the complicity of one of the parties, *Tongue* v. *Tongue* (2) sufficiently shews that it may be implied from the fact of the other party having signed the register with the name suppressed. It may be attempted to distinguish *Tongue* v. *Tongue*, on the ground that in that case it was the guardian who interfered and endeavoured to set aside the marriage. But that argument is disposed of by the remarks of Sir *W. Scott*, in *Sullivan* v. *Sullivan* (3), who says that it depends entirely on the circumstances whether the assent or non-assent of the guardian is of any importance.

In *Pouget* v. *Tomkins* (4), which was under the old Act, misdescription of persons in the publication of banns was held fatal to the marriage.

As to the husband's statement, that he did not know he was doing wrong, the Court must be asked to disbelieve it. With what motive can he be supposed to have omitted the names, except that of concealment? As to the lady, the only piece of evidence against her is that she signed the register in an unusual way,

(1) 2 B. & Ad. 909, 915.
(2) 1 Moo. P. C. 90.
(3) 2 Hagg. Consist. 241.
(4) Ibid. 142.

omitting the name she was best known by. But it is remarkable that she omitted the same name in signing as the husband omitted in giving the instructions; and that was held in *Tongue* v. *Tongue* (1) to be sufficient to lead to the presumption of knowledge of misrepresentation.

The VICE-CHANCELLOR :—If, as you say, a fraud upon this Act of Parliament has been committed, the husband was guilty of a misdemeanour. Then must not the evidence against him be proved as strictly as if we were now trying a case of misdemeanour ?

Mr. *Russell*:—The Plaintiff comes to the Defendant for this property ; he is required to prove his title ; the onus of proving it is on him. In attempting to do this he refers the Defendant to the register; and this certificate is brought forward, being a document which, on the face of it, may relate to the marriage of two other persons than the Plaintiff and his late wife. A person who produces such a document as this is bound to explain it; otherwise a husband has only to hold his tongue in order to defeat an Act of Parliament. But he does admit he is bound to explain, for he attempts to do so. No doubt, *Pouget* v. *Tomkins* (2) was under the old Act, under which a misdescription *ipso facto* avoided a marriage; and this hardship was relieved against by the statute of 1823, which requires proof to be given of knowing and wilful misrepresentation. Do not the circumstances here amount to this? Was not their conduct a fraud upon the statute? There is nothing in the statute to say that the subsequent assent of the guardian removes the objection.

Upon the whole, this is a case precisely within the mischief the Act of Parliament was intended to prevent.

Mr. *Woodroffe*, for the Defendant *Murphy*, asked for his costs.

Mr. *Kay*, in reply :—

The strong presumption in favour of this marriage, arising from more than twenty-four years of unchallenged repute during the whole of the wife's life, and for some time afterwards, sufficiently distinguishes this case from *Tongue* v. *Tongue* and *Pouget* v.

(1) 1 Moo. P. C. 90. (2) 2 Hagg. Consist. 142.

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Tomkins (1), which were cases of gross fraud. In such a state of circumstances the same rules of evidence do not apply. Mr. *Kensit* is bound to prove his case, and he brings nothing to contradict the testimony of the Plaintiff, who swears that he had no intention of committing any fraud whatever. Every one is familiar with the practice of dropping a superfluous name for the sake of brevity.

SIR JAMES BACON, V.C.:—

This case is a very singular one. For more than twenty-four years two persons, who were married in 1841, lived together and were reputed to be husband and wife, not less by the Defendant Mr. *Kensit* than by any one else. The presumption in favour of such a marriage is very strong; but like every other presumption, it is capable of being rebutted by facts, if such there are. Mr. *Kensit* undertakes to rebut this presumption. He says that the marriage was celebrated "without due publication of banns." The only evidence which he brings forward in support of this statement appears from his own answer. He says he has obtained a certified copy of the register of the marriage, from which it appears that the names of the parties married were *Frederick Gompertz* and *Adelaide Harvey*, whereas the parties who went through the ceremony were named *William Frederick Louis Gompertz* and *Georgiana Adelaide Harvey;* and that they were married by banns. Mr. *Kensit* says, further, that he has obtained a copy of the entry in the register of banns (which I suppose relates to the days on which the publication was made), in which the parties are also described, as above, each by two names only. The banns appear to have been published in church on the three days which the law requires; and the marriage took place. Of the names in which the publication itself was made, there is no evidence.

In that state of things, after the expiration of now more than thirty years, the Court is asked to put in force the provisions of the Act of the 4 Geo. 4, c. 76, by which it is enacted that "if any persons shall knowingly and wilfully intermarry without due publication of banns," the marriage shall be "null and void to all intents and purposes."

(1) 2 Hagg. Consist. 142.

Now, evidence that this marriage was "knowingly and wilfully" celebrated by both parties "without due publication of banns," beyond the production of the copy of the register on the Defendant Mr. *Kensit's* part, there is none. The Plaintiff, Mr. *Gompertz*, indeed, does bring evidence on the subject, for he says: "I deny that I left out the other names of myself or wife with any fraudulent intent to avoid the discovery of the said intended marriage; but I did so for brevity's sake only."

These, I believe, are all the essential facts. From them Mr. *Kensit* takes upon himself to shew that fraud was committed by both parties. Mr. *Amphlett* did not shrink from that position at all. Mr. *Kensit* undertakes to prove that the undue publication was knowingly and wilfully caused by both parties. Now evidence, as I have said, on Mr. *Kensit's* part there is none, beyond what is contained in his answer. But he has read—indeed he was obliged to read—the evidence of Mr. *Gompertz* himself, who says, "The banns were published by my sole direction and instructions, and when I gave such instructions for the publication in the names by which we were afterwards married, I did so, not considering, or either thinking or believing, that I was doing anything wrong, or acting contrary to law."

A charge of fraud is made against Mr. *Gompertz*, and when this passage is produced to meet it, the Court is asked to assume that what he says is not true. He says he did what he did "for brevity's sake." There is no evidence to shew that the names were not published in full; but if they were published only as Mr. *Gompertz* gave them, why is the Court to presume that he gave them wilfully and knowingly with a view to concealment? Is it so rare a thing in the affairs of the world to find a man signing or giving his address with the omission of one or more of his names? Giving the utmost effect to the Act of Parliament, I cannot say that the offence against which the statute was directed has been committed.

Then I am asked to presume fraud against the wife. Both parties must be shewn to have knowingly and wilfully concurred in the undue publication. But it appears from Mr. *Gompertz's* evidence that she knew nothing at all about it. Against that statement I am asked to infer that she did know, because she signed the register with one name only, which was not the way in which

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she usually signed her name. That circumstance cannot now be satisfactorily explained, as she is no longer living. Then, upon what ground can I presume fraud against this lady? I have no safe ground for so doing; I cannot say that, because all the true names were not used, the omission was knowingly and wilfully made by both parties.

I am satisfied that there is nothing in the authorities to contravene this conclusion. The case which was most strongly urged upon me, *Tongue* v. *Tongue* (1), bears no sort of analogy to the present. In that case the evidence of the sextoness (2) shewed that the man (who was a minor) was just as much a party to the fraud as the woman. The woman was shewn to have contemplated the fraud, and the omission by the young man of the name of *Croxall*, by which he was generally known, was of the most vital importance, as shewing that he was cognisant of the fraud. The case of *Tongue* v. *Tongue* could not have been decided otherwise upon the facts there proved—the man being as much a party to the fraud as the woman who confessed it.

No observations were made by the Defendants' counsel on the case of *Rex* v. *Inhabitants of Wroxton* (3), where the facts were much stronger against the validity of the marriage than they are here. There the husband knew the name of the wife, and said he would see to the proper publication of the banns. She took no step; and he procured the banns to be published in a wholly false name. In the publication of the banns the woman was described as *Agnes*, her real name being *Susannah*. During the marriage ceremony the clergyman used the name *Agnes*, and the woman observed the difference, but was told by the husband to hold her tongue. So that both parties had knowledge of the misdescription. But the marriage was supported on the ground that there was no proof of the knowledge by both parties of the undue publication of banns. Is there a particle of evidence in this case to shew that the wife had any knowledge whatever that there had been an undue publication of banns?

I think that there was no reasonable ground upon which Mr.

(1) 1 Curt. 38; 1 Moo. P. C. 90. (2) 1 Curt. 44.
(3) 4 B. & Ad. 640.

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Gompertz's request was refused by Mr. *Kensit*, and that Mr. *Gompertz* is entitled to the relief which he asks.

As to the costs, considering the answer which Mr. *Kensit* has put in, I should have been much inclined to make him pay the costs of the suit; but, as there happens to be a fund, I think the ends of justice will be sufficiently met if I allow the Plaintiff's costs to come out of the fund, giving no costs to Mr. *Kensit*.

With respect to the other Defendant, Mr. *Murphy*, I wholly disapprove of the course he has pursued. Instead of joining the Plaintiff, he has chosen to put in a long answer, and so to have incurred expense. I cannot give Mr. *Murphy* any costs.

There will be a decree for the execution of the trusts of the will; an inquiry as to debts; with a declaration that the Plaintiff and the Defendant *Murphy* are entitled, as trustees of Mrs. *Spring's* settlement, to the waterworks shares and the income of them since the death of the tenant for life, the amount to be verified by affidavit; and a direction that the same, subject as above, be transferred and paid to the Plaintiff and *Murphy*, as such trustees.

Solicitors for the Plaintiff: Messrs. *Lewis & Lewis*.
Solicitor for the Defendant *Kensit*: Mr. *George Kensit*.
Solicitor for the Defendant *Murphy*: Mr. *J. A. Parry*, agent for Mr. *George Parry, Pembroke Dock*.

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Jan. 19, 23, 28.

[1869 A. 117.]

Will—Republication—1 *Vict. c.* 26, *ss.* 15, 34.

Testatrix by her will gave a share of her residuary real and personal estate to *B.*, and one of the attesting witnesses to the will was *B.'s* wife. By a codicil, which was attested by other witnesses, testatrix, after a direction to her executors to allow an extended time for payment of a debt due to her from one of her legatees, confirmed her will in other respects:—

Held, that the duly attested codicil had the effect of republishing and incorporating the will so as to render the gift to *B.* valid, notwithstanding attestation of the will by *B.'s* wife.

17 Eq. 66
16 L.R. 286

HANNAH ANDERSON, widow, by her will, dated the 10th of December, 1868, gave, devised, and bequeathed all the rest and

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residue of her estate and effects whatsoever and wheresoever unto and to the use of her son *George Anderson* and *Henry Letts*, whom she appointed executors and trustees of her will, upon trust to sell or convert, call in, recover, and receive such parts as should not consist of money, and to divide the net residue (except the five houses thereinafter mentioned) into five equal parts, one of which fifths she bequeathed to each of her sons, *Edward Charles*, *Joseph*, *George*, *Thomas*, and the remaining fifth to her daughter *Charlotte Tolhurst*, for her sole and separate use.

As to the five excepted houses, three of which were freehold and two leasehold, the sale was to be postponed until after the death of her daughter *Charlotte*, unless an advantageous opportunity of disposing of them should occur. The net annual income of the houses, or the net annual interest of the produce of such parts as might from time to time be sold, was to be paid unto *Charlotte Tolhurst*, during her life, for her separate use, without power of anticipation; after the death of *Charlotte*, testatrix directed the five houses, if not sold previously, to be sold, and the net produce, after payment of all expenses, to be divided into four parts, one part to be paid to *Edward Charles*, one to *Joseph*, one to *George*, and the remaining fourth to *Thomas Anderson*, to whom respectively she bequeathed the same.

The will was attested by *Jemima Fishenden* and *Hannah Anderson*, wife of *George Anderson*, the executor and legatee named therein. By a codicil to her will, dated the 22nd of January, 1869, and duly attested by other witnesses, testatrix authorized her executors to allow her son *Thomas* such an extended time to pay what might be owing to her from him, and not bequeathed to him, as they should consider advisable, and confirmed her will in other respects.

A *caveat* having been entered on behalf of the Plaintiff, who was a son of the testatrix, but excluded from all benefit under her will, against the grant of probate of this will and codicil, issue was joined in the probate proceedings, and on the 6th of November, 1869, when the cause came on to be heard in the Probate Court, the Judge, by his final decree, pronounced for the form and validity of the will and codicil, of which probate was granted on the 23rd of November, 1869.

The case made by the bill was that as one of the attesting witnesses to the will was the wife of *George Anderson*, one of the legatees, all gifts of real and personal estate in favour of *George Anderson* were null and void, and the property therein comprised passed, as undisposed of, to the heir-at-law and next of kin respectively of the testatrix.

Mr. *Fry*, Q.C., and Mr. *Key*, for the Plaintiff, referred to sect. 15 of the *Wills Act* (1 Vict. c. 26), and contended that the codicil had not the effect of giving validity to the bequest to *George Anderson*.

Mr. *Willcock*, Q.C., and Mr. *F. T. White*, for Defendants, contended that the effect of the codicil, which was duly attested and expressly confirmed the will, was to republish and incorporate the will in the codicil, making the will operate precisely as if it was executed on the day of republication. By thus giving that which was *pro tanto* an unattested instrument the effect and validity of a duly attested testamentary instrument, the defect in the gift to *George Anderson* arising from his wife having been an attesting witness to the will, was cured, and he was entitled to his legacy.

The difficulties which had arisen in some of the cases of identifying the particular instrument referred to in the later and duly executed testamentary instrument, did not here occur, as the will and codicil had both been admitted to probate.

They cited *Habergham* v. *Vincent* (1); *Doe* v. *Walker* (2); *In re Earl's Trusts* (3); *Allen* v. *Maddock* (4); *In the Goods of Lady Truro* (5); 1 Vict. c. 26, ss. 15, 34.

Mr. *Fry*, in reply:—

Words of reference must be construed in their strict and primary sense, and when a codicil refers to a will, that must be a will which satisfies the requirements of the *Wills Act*: *Croker* v. *Marquis of Hertford* (6); *Wigram* on Wills (7). If there is no document legally satisfying the requirements of a will to which the codicil

(1) 2 Ves. 204, 228.
(2) 12 M. & W. 591, 600.
(3) 4 K. & J. 673.
(4) 11 Moo. P. C. 427.
(5) Law Rep. 1 P. & D. 201.
(6) 4 Moo. P. C. 339, 363.
(7) Page 18.

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can be held to refer, then, looking into the extrinsic circumstances, papers purporting to be testamentary, though not so in the strict and primary sense, may be rendered valid by the duly attested codicil. But this rule of construction does not apply when the codicil purports to confirm as a will that which is not legally a will. For the purpose of seeing whether the will referred to is valid we are entitled to look at the attestation. Finding that, from the way in which the will has been attested, the gifts to *George Anderson* are rendered void, we say that the codicil has not the effect of curing the defect or rendering the particular gift valid.

Even if the decision of the Court should be against us we are entitled to our costs of obtaining the opinion of the Court upon a doubtful point of construction: *Thomason* v. *Moses* (1); *Lee* v. *Delane* (2); *Morgan* and *Davey* on Costs (3).

Jan. 27. SIR JAMES BACON, V.C.:—

The question which arises in this suit is, I believe, entirely novel; the subject to which it relates is unquestionably of great importance, involving, as it does, a very valuable provision in the *Statute of Wills*, by which the law as it previously existed has been greatly altered and improved. Before the statute any beneficial interest given by will to the persons by whom such will might be attested was null and void; but the attesting witnesses were not disqualified from proving, as witnesses, the due execution of the testamentary instrument: 25 Geo. 2, c. 6. The existing statute, keeping in view the principle of public policy which is obviously involved in the former law, has extended its operation; and by the 15th section it is enacted, "That if any person shall attest the execution of any will to whom, or to whose wife or husband, any beneficial devise, legacy, estate, interest, gift, or appointment of or affecting any real or personal estate, shall be thereby given or made, such devise, legacy, &c., shall, so far and only as concerns such person attesting the execution of such will,

(1) 5 Beav. 77. (2) 4 De G. & Sm. 1.

(3) Page 67.

or the wife or husband of such person, be utterly null and void; and such person so attesting shall be admitted as a witness to prove the execution of such will, or to prove the validity or invalidity thereof, notwithstanding such devise, legacy, estate, interest, gift, or appointment mentioned in such will." The Plaintiff's claim is founded upon that provision. [His Honour, after stating the case, continued:—] Upon this very simple state of facts the Plaintiff has contended that the provision of the statute to which I have referred applies in direct terms, and that by the effect of it all such interest as *George Anderson* would have taken under the will is forfeited, and that the testatrix must be held to have died intestate as to so much of her estate as *George Anderson* would have taken according to the tenor of the will, if his wife had not been one of the attesting witnesses.

The Defendant, on the other hand, insists that the will and codicil together form one, and but one, testamentary instrument; and that the object and effect of the codicil was to repeat and confirm the bequests contained in the will; that its operation was to incorporate the will with the codicil; and that the latter instrument having been duly executed by the testatrix, and attested by unobjectionable witnesses, neither the letter nor the spirit of the statute is infringed; that all the requisites of the law are complied with; and that there is no foundation for the Plaintiff's suit.

Now, in order to decide the point which is raised, the first question to be solved is, what is the will of the testatrix? The statute (sect. 9) enacts that no will shall be valid unless it be in writing, signed or acknowledged by the testator in the presence of, and attested by, two witnesses. If the codicil in question can be held to be the will of the testator, these requisites are complied with. In the course of the argument reference was made to several cases, the most important of which, as well as the most recent, appears to be *Allen* v. *Maddock* (1), in which the testatrix, having made what purported to be a will, dated in December, 1851, but attested by one witness only, had afterwards, in September, 1856, executed a testamentary paper, which was duly attested, and which commenced with the words, "This is a codicil to my last will and testament." The Court of Probate, being satisfied that

(1) 11 Moo. P. C. 427.

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the instrument of 1851 was the will which the testatrix referred to in the codicil, decreed probate of the two papers as together constituting the will of the testatrix; and it was from that decision that the appeal to the Privy Council was brought. The argument in that case principally turned upon the question, whether the codicil had sufficiently identified the paper of 1851, and it was contended that parol evidence of that fact, upon which the Court below had proceeded, was inadmissible for the purpose of proving such identity. No such point exists in the present case, because the two papers, will and codicil, having been together admitted to probate, the identity of the paper of 1851 with the will mentioned in that testatrix's codicil must be taken to be established. The Privy Council decided that the parol evidence was admissible, and that it proved satisfactorily the identity of the paper referred to in the codicil. But the greater value of this most valuable judgment is, that it decides in very express terms, and by reference to numerous authorities as well before as since the *Statute of Wills*, that the due execution by a testator of a codicil amounts to a republication of a former will, if the codicil refers to such former will, and that, without any regard to the fact whether or not the paper so referred to complied with the requirements of the law as to execution or attestation of such paper; and, referring to the alterations introduced by the existing statute, it pronounces that thereby "the ceremonies necessary to authenticate the instrument are altered; but no alteration is here made in the effect to be given to words used in it. It would seem that a paper which would have been incorporated in a will executed according to the *Statute of Frauds* must now be incorporated in a will executed according to the new Act." And their Lordships, referring to the case on Lord *Hertford's* testamentary papers (1), point out and adopt the distinction to be made since the new Act with respect to the unattested papers referred to, the identity of which was not clearly proved (2). With these authorities the law is too clear to admit of any doubt upon the single question raised. Sect. 24 enacts that a will shall be construed to speak from the death of the testator; and sect. 34 that the Act is not to extend to wills made before the 1st of January, 1838, "and that every will re-executed or republished or revived

(1) 4 Moo. P. C. 339. (2) 11 Moo. P. C. 458.

by any codicil shall, for the purposes of this Act, be deemed to have been made at the time at which the same shall be so re-executed, republished, or revived." It was much pressed in the argument on the part of the Plaintiff that the very existence of the will could not be proved, except by the persons who had attested it, and, therefore, that the evil which the statute sought to prevent would be admitted unless the legacy in question were declared to be forfeited. I do not know, and I have no right to inquire, upon what evidence the Court of Probate decided. But I am clearly of opinion that there is no reason to apprehend that, by treating the codicil duly attested as a republication and confirmation of the will, any relaxation of the wholesome provision of sect. 15 would be effected.

That in the execution and attestation of the codicil in question all the requisites of the statute were complied with is clear. None of the evils which the statute intended to prevent can arise; and it would be as much beyond the provisions and the contemplation of the statute, as it would be opposed to good sense and reason, to hold that the codicil, duly executed and attested, had not the effect of republishing the will, and making it a new and original disposition by the testatrix in January, 1869, of the estate which she had dealt with by the will of December, 1868. To hold otherwise would be to hold that any error in a will, once duly executed, could not be corrected but by an entirely new will, for which proposition there is no authority. It cannot be said that the testatrix could not have made a new will if she had been so minded. Suppose that, by the codicil, she had said, "I am aware that my will is so erroneously attested as that my son's legacy will be forfeited, and to prevent that I execute this codicil, and do thereby confirm my will." There can be no doubt that she was competent to do this up to the latest moment of her life. I am of opinion that she has done this by the duly executed codicil; that the whole contents of the previously existing will were incorporated in the codicil; and, therefore, that Plaintiff's bill must be dismissed.

Solicitors: Mr. *G. R. Longdon;* Mr. *J. Letts.*

V.-C. B.
1871
Nov. 10, 11.

In re GREENING & CO.

MARSH'S CASE.

Winding-up—Costs—Past Members—Companies Act, 1862, *s.* 38.

Past members of a company settled upon the B list of contributories having bought up the debts to which they were liable, *held* liable to pay the costs of settling the B list, unless the liquidator had money in his hands sufficient to pay them.

THIS case came before the Court upon two summonses adjourned from Chambers—first, on behalf of Messrs. *Marsh*, that their names might be removed from the B list of contributories of *Greening & Co. Limited*, as settled by the liquidator; and, secondly, on behalf of the liquidator for payment of a certain call: the real question, however, being to what extent contributories in class B were liable for the costs of the liquidation.

Messrs. *Marsh* transferred their shares in the company in January, 1869, and in October following the company was wound up voluntarily; which winding-up was afterwards ordered to be continued under the supervision of the Court. The persons to whom Messrs. *Marsh* transferred their shares having become bankrupt, the liquidator had attempted to fix Messrs. *Marsh* as present members of the company on the ground of an informality in the execution of their transfer; but on the 15th of February, 1870, an order was made removing their names from the list of contributories as present members without prejudice to any application on the part of the liquidator to fix them as past members.

On the 26th of July, 1870, the liquidator sent to Messrs. *Marsh* a notice that he would proceed on the 1st of August to settle them on the list of contributories as past members, and make a call of £3 10*s.* per share.

It appeared that £876 was the total amount of debts of the company, for which Messrs. *Marsh* would have been made liable, and that after the settlement of their names on the B list, and the making of the call now sought to be enforced, Messrs. *Marsh* bought up all the debts due when they ceased to be members, with

the exception of some small sums remaining due, not exceeding in the whole £10, which Messrs. *Marsh* offered to pay into Court. The call of £3 10*s.* per share on the past members would produce upwards of £3000; and as this sum far exceeded any debts for which the B contributories could be made liable, and it was in evidence that the liquidator at the time of settling the list had in his hands funds sufficient for payment of the costs of settling the B list, the real question was, whether the B contributories could be called upon to contribute to the general costs of the winding-up.

Mr. *Amphlett*, Q.C., and Mr. *Brooksbank*, for Messrs. *Marsh*:—

Until there has been an ascertained deficiency to meet the debts for which they are liable the Court will not direct a call to be made upon the B contributories. Past members are made contributories, with the limitations imposed by the *Companies Act*, 1862, s. 38, sub-ss. 2, 3, simply out of regard to the creditors, and not by way of assisting the existing members. The rights of contribution as between the A and B classes are laid down in *Morris's Case* (1).

As soon as the debts existing when the B contributories retired have been satisfied, and it is immaterial whether payment has been made before or after the call—*Brett's Case* (2), overruling the judgment of Lord Justice *Giffard* in *In re Accidental and Marine Insurance Corporation* (3)—their liability ceases. Here all debts for which Messrs. *Marsh* could have been made liable under sect. 38 have been paid by them and the existing members have no equity, and no call can be made, to enforce payment from the B contributories of the costs of the winding-up, which can only affect present members, all liability attaching to the past members in respect of debts of the company having now been satisfied.

[They also referred to sects. 98 and 133 of the *Companies Act*, 1862.

Mr. *Kay*, Q.C., and Mr. *E. S. Ford*, for the liquidator:—

The enactment in sect. 38 of the *Companies Act*, 1862, is plain and positive that past members shall be liable to contribute to the

(1) Law Rep. 7 Ch. 200. (2) Law Rep. 6 Ch. 800.
(3) Law Rep. 5 Ch. 428.

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assets of the company "for payment of the debts and liabilities of the company, and the costs, charges, and expenses of the winding-up;" and although sub-sect. 2 relieves past members from debts and liabilities of the company contracted after the time at which they ceased to be members, no such relief is given as to the costs of the winding-up. What equity is there to make the A contributories, or existing members, pay, in exoneration of the B contributories, the costs incurred by settling the B list?

Beyond all question, a substantial amount of the costs must have been incurred in settling the B list; and it is not until long after those costs have been incurred, that the B contributories come forward and pay the debts. Sect. 102 enables a call to be made, and payment to be ordered to satisfy, not only the debts and liabilities of the company, but also the costs, charges, and expenses of winding it up, and for the adjustment of the rights of the contributories *inter se;* and sect. 144 makes the costs, &c., properly incurred in the voluntary winding-up of a company, a first charge on the assets of the company. The observations of the Lord Chancellor in *Brett's Case* on the costs of the winding-up (1) seem to shew, not only that B members are liable to provide for the costs incurred in respect of B debts, and cannot throw them upon the A fund, which is already deficient, but that they are liable to contribute to all the costs of the winding-up, subject, of course, to this limitation, that they cannot ever be called upon for more than the amount due upon their shares.

[They also cited *Helbert* v. *Banner* (2).]

SIR JAMES BACON, V.C.:—

The judgment of the Lord Chancellor in *Brett's Case* throws upon me the necessity of dealing with that case, which he said it was not necesary then to decide, and the difficulties of which he then pointed out. In so doing he used expressions which I find to be a sufficient guide for dealing with this case; for, as I understand his judgment, it was, that the Act of Parliament is not to be read, as has been suggested, by the mere literal construction, but that the Court is to deal with the question of the costs as the justice of the case before it requires. A liability to contribute to the costs, no

(1) Law Rep. 6 Ch. 807. (2) Law Rep. 5 H. L. 28.

doubt, falls upon all the members; not an equal liability, but a liability for the B or the A members to pay no other costs than those which fairly belong to their relative positions. Cases have been cited, and one was urged by Mr. *Higgins* in the argument before the Lord Chancellor, in which the greater part of the costs have been incurred in consequence of difficulties raised by the B class, or from it being difficult to compel them to do justice. In such a case, giving full effect to the words of the Act of Parliament, following the entire spirit and meaning of it, and not departing from the rules which govern this Court upon the question of costs, it would be reasonable, I think, to make the burden of the costs fall upon those persons who fairly deserve to bear it. Suppose that it was necessary to resort to the B list in order to pay in full the debts of the company, and that there was one shilling, or any other small sum, due from one man, and that all that the liquidator had received, or could receive, had been disbursed in paying dividends to the creditors upon the A list—can it be the meaning of the Act that all the costs, it may be of a very expensive winding-up, should be borne by that man?

I quite agree that it could not have been intended, in the face of this Act, that the B contributories were to go free from any contribution to the costs, but I say that the discretion of the Court must be exercised upon this subject of costs; and I understand that expression of the Lord Chancellor, in *Brett's Case* (1), "*reddendo singula singulis*," plainly to mean that the costs are to be disposed of between the persons named in the respective lists according to the circumstances of the case, and that the contributories cannot escape from the payment of some costs which have been incurred since the winding-up order was made. No doubt the duty of the liquidator is to make out a list, and this list must include those who are immediately and directly liable, the A contributories, and those who are only secondarily liable, the B contributories. The costs, so far as they have been occasioned by the B contributories, I think the B contributories are bound to pay, that is, they are bound to pay those costs if not already paid. The B list having been made out, the liquidator exercises the authority he possesses of making a call. Now he makes what I do not hesitate

(1) Law Rep. 6 Ch. 807.

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to say was a most unreasonable call under the circumstances: he makes a call of £3 10*s.* 1*d.* a share on each of the B contributories who have not paid—not including, I suppose, those who have paid —and he wants £3000 raised by this call. That is an abuse of his authority. He had no right to do any such thing. The utmost amount he could require must have been very much less than that. [His Honour, after referring to the balance sheet of the liquidator, and the statement that he had retained or paid £800 for costs incurred up to that time, continued:—] If the costs up to that time included the costs of settling the B list as well as the A list, to those costs he, as liquidator, was justly entitled; and the B contributory cannot escape from it unless it has been already paid. There must be some inquiry upon that subject. It must be ascertained what was the state of things when he designed to make a call for £3000. It is true the B contributory had not at that time acquitted his obligation to the company, but it is out of all sense and reason that he and the others should thereupon be called upon to pay £3000. It is this unreasonable demand which gives occasion to this proceeding. I cannot make the B contributory, who is before me, pay any portion of the costs. As to the costs up to the time of the call, I think the liquidator was entitled to be paid them if he had not already been paid; but if he had been paid out of the assets of the company he had no claim whatever against the contributories. He had a right to make a call, but no right to make such a call as he did make. I can give him no costs, therefore, of that proceeding. Nor can I give the B contributory any costs, and for this reason, that although he has since satisfied the Court that he is under no obligation to pay any money in respect of debts for which he was liable, he has not until lately—the present moment almost—acquitted himself of that obligation. He had a right to reduce the amount of call; he had a right to pay off the debts, as he has done, as effectually as in *Brett's Case* (1). But I can give him no costs of that proceeding, because his acquitting himself of the obligation came too late in the day. I give no costs against him.

Mr. *Amphlett* was heard upon the question of the costs of settling

(1) Law Rep. 6 Ch. 800.

the B list, and submitted that the costs of making the call and settling the list, being one act done on the same day, could not be divided.

After some discussion, in the course of which His Honour observed that if the costs of the liquidation did not at the time of settling the B list exceed the sum of £800 retained by the liquidator for costs, the B contributories would not have to pay any costs,—the order was taken in the following form:—

It appearing that the whole of the B debts have been satisfied, with the exception of £10, which Messrs. *Marsh* offer to pay into Court, upon such payment being made, dismiss the summons for the call. No costs of these proceedings, but the liquidator to have his costs out of the estate, and the B contributories to pay the costs of settling the B list unless the liquidator has money in his hands sufficient to pay them.

Solicitors: Mr. *A. Pulbrook;* Messrs. *Merriman & Co.*

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1871
Dec. 20;
1872
Jan. 20.
Feb. 10.

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[1871 D. 128.]

Libellous Matter in Newspaper—Printer and Publisher—Proprietors' Names—Bill of Discovery—6 & 7 *Will.* 4. *c.* 76—32 & 33 *Vict. c.* 24—33 & 34 *Vict. c.* 99.

A demurrer to a bill alleging that certain newspapers contained articles or paragraphs, and other matter, libelling the Plaintiff; that the Defendant was the printer and publisher of the newspapers; and that the Plaintiff had instructed his solicitor to bring an action for damages against the proprietors of the newspapers, and seeking for the discovery of their names under the provisions of statutes 6 & 7 Will. 4. c. 76, s. 19, and 32 & 33 Vict. c. 24, was overruled.

THE bill alleged that in the numbers of the *Pall Mall Gazette* of the 18th of May, 1870, and the 7th and 9th of August, 1871, and in the number of the *Pall Mall Budget* of the 12th of August, 1871, there were certain articles or paragraphs, and other matter, libelling the Plaintiff; that the Defendant was the printer and publisher of both newspapers, published and issued on the days mentioned; and that the Plaintiff instructed his solicitor to bring an action for damages against the proprietor or proprietors of the newspapers. In pursuance of such instructions, the Plaintiff's solicitor, in October, 1871, wrote and sent to a Mr. *George Smith*, who, he had been informed, was the proprietor of the newspapers during the year 1870, and still was so, asking whether he was correct in these facts, and for the name of his solicitor. Mr. *Smith's* solicitor replied, giving the name of the Defendant as the publisher; and in reply to other letters, in one of which there was a threat to file a bill of discovery under the statutes 6 & 7 Will. 4, c. 76, s. 19, and 32 & 33 Vict. c. 24, he intimated that if an action should be deemed necessary, it would be more in conformity with general usage to bring it against the publisher, and declined to give the names or name of the proprietors or proprietor. The bill further alleged that the Plaintiff had sustained great loss and damage by reason of the libellous matter contained in the newspapers mentioned; charged that the Plaintiff was entitled,

under the circumstances, to a full discovery from the Defendant of the names or name of the proprietors or proprietor of the newspapers issued and published on the days mentioned, and in which was contained the said libellous matter respecting the Plaintiff, in order the more effectually to enable the Plaintiff to bring and carry on an action in a Court of Common Law for damages sustained by him by reason of the said libellous matters.

The Plaintiff prayed that the Defendant might make a full discovery of the name and address, or names and addresses, of the person or persons who, at the times above mentioned, was or were the proprietor or proprietors of the newspapers named.

The cause came on to be heard on demurrer.

Mr. *Davey*, for the Defendant:—

This is called a bill of discovery; but such a bill ought not to be brought before the Court. The allegation of libel is not very precise. It is merely an allegation that the papers contained libellous matter. It may be doubted whether there is a sufficient allegation that the Plaintiff intends to bring an action at all. At any rate there is no allegation that it is intended to bring an action against the publisher. He would be a stranger to the action, and merely a witness. The fact that the Defendant is connected with the newspapers cannot make any difference whatever. The Plaintiff has no right to file a bill of discovery against him in aid of an action at law; for a mere witness, except he be a secretary to a company, or connected with a corporation, cannot be a Defendant. It is quite clear that a bill of discovery cannot be maintained in aid of an action against any person who is not a party to the record at law. The object of this bill of discovery is to obtain evidence in the action. It may be gathered from the correspondence that the statutes will be relied upon by the Plaintiff; but looking at the preamble of the 6 & 7 Will. 4, c. 76, it would seem that that statute has nothing to do with this case, for the clauses have reference to the imposition of penalties upon persons, publishers of newspapers, for not printing their names and making certain returns. The object of the statute was, that any person properly made a party to a bill of discovery should not protect himself by plea or demurrer, on the ground that he would expose

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himself to penalties. Where the statute speaks of the Defendant to such a bill, it means the person against whom the Plaintiff has a right to file one. If the construction to be submitted on the other side be the right one, a Plaintiff in an action for libel will be able to file a bill against any person whom he knows or suspects can give evidence, and previously extract from him that which he would, when called as a witness, say, and thus obtain materials for cross-examination. A bill filed against a mere witness is not strictly one of discovery, but to find out what evidence he intends to give. If the Defendant could give the discovery now sought for, it would be no evidence against the proprietors, whoever they may be; and I submit that the demurrer ought to be allowed.

[He mentioned the cases of *Fenton* v. *Hughes* (1); *Cardale* v. *Watkins* (2); *How* v. *Best* (3); *Glyn* v. *Soares* (4); *Balls* v. *Margrave* (5); *Kerr* v. *Rew* (6).]

'Mr. *Greene*, Q.C., and Mr. *Jolliffe*, for the Plaintiff:—

This bill has been filed under the provisions of the 6 & 7 Will. 4, c. 76, s. 19: whereby it is enacted "That if any person shall file any bill in any Court for the discovery of the name of any person concerned as printer, publisher, or proprietor of any newspaper, or of any matters relative to the printing or publishing of any newspaper, in order the more effectually to bring or carry on any suit or action for damage alleged to have been sustained by reason of any slanderous or libellous matter contained in any such newspaper respecting such person, it shall not be lawful for the Defendant to plead or demur to such bill; but such Defendant shall be compellable to make the discovery required; provided always that such discovery shall not be made use of as evidence or otherwise in any proceeding against the Defendant, save only in that proceeding for which the discovery is made." The Defendant, the printer and publisher of the newspapers, is the only person against whom the Plaintiff can proceed for the discovery he wants. The demurrer admits the libel and the damage done to the Plaintiff. The provisions of this

(1) 7 Ves. 287.
(2) 5 Madd. 18.
(3) Ibid. 19.
(4) 3 My. & K. 450.
(5) 3 Beav. 448.
(6) 5 My. & Cr. 154.

Act are the only means the Legislature has provided for getting at the names of the proprietors of newspapers. The Plaintiff cannot file a bill against the proprietors of these papers, because he does not know who they are. The Plaintiff has a clear right given him to file a bill against any person he chooses to obtain the names of the proprietors whom he alleges have libelled him; but the Defendant has been registered as a person connected with these papers. The cases referred to do not apply. It was in consequence of those decisions that the 19th section was passed. The Plaintiff does not ask for any evidence, but only the names of the proprietors. He does not seek to charge the Defendant; but his bill alleges that, in the articles published, there is libellous matter against him. The articles complained of are not set out in the bill, because that would be a further publication of the libels. The Act clearly contemplates the filing of a bill before any action is brought. The Defendant, being the printer, is a proper party: he can give the information which is sought under the Act of Parliament. To confine the Act to a bill against some one or more proprietors would be to limit this beneficial clause, which, it may be observed, does not apply to penalties. A plea or demurrer not being lawful, this demurrer ought to be overruled.

Mr. *Davey*, in reply:—

If the printer and publisher be a proper Defendant to this bill of discovery, then it will be very difficult to draw a line between him and any other stranger; but there is not a single allegation that the Defendant does know who the proprietors of these newspapers are. There is, in fact, no necessity that he should know them. The section of the Act must be confined to an action for damages against the Defendant alone, and this Defendant will clearly be a stranger to the action proposed to be brought.

It was, on a subsequent day (20th of January, 1872), mentioned that the 6 & 7 Will. 4, c. 76, had been repealed in part by the statute of 32 & 33 Vict. c. 24; that sect. 19 of the former Act had been re-enacted in the latter Act; and that the statute of 33 & 34 Vict. c. 99, did not refer to the 32 & 33 Vict. c. 24, but

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repealed the original Act so far as not already repealed, and left the law as it previously was under the original section 19.

Feb. 10. SIR JOHN WICKENS, V.C.:—

This is a general demurrer to a bill of discovery, purporting to be filed under the provisions of the Act 6 & 7 Will. 4, c. 76, s. 19, or (more accurately) under the provisions of the Act 32 & 33 Vict. c. 24, which repeals and re-enacts the clause in question. The former Act, after imposing certain stamp duties on newspapers, requies that the names of the printer and publisher of every newspaper, and those of every proprietor of a newspaper resident out of the *United Kingdom*, and of two at least of the proprietors of a newspaper resident within the *United Kingdom*, shall be declared to a public officer, so as to be ascertainable by the public at any time. [His Honour then read the 19th section of the Act.] The Act 32 & 33 Vict. c. 24, repeals certain provisions of this Act, including those for enabling the public to ascertain the names of the proprietors, and also sect. 19. But that section is continued as if enacted in the body of the repealing Act. The Act 33 & 34 Vict. c. 99, repeals the original Act so far as not already repealed. The result seems to be that sect. 19 of the original Act is still in force; but in force as an enactment of 1869, and not as an enactment of 1836. The Plaintiff in this case alleges by his bill that three numbers of the *Pall Mall Gazette*, of which newspaper the Defendant *Enoch* is printer and publisher, and a number of the *Pall Mall Budget*, of which the Defendant is also printer and publisher, contain certain articles or paragraphs, and other matter, libelling the Plaintiff, and that he has sustained great loss and damage by reason of such libellous matter, and he seeks a discovery from the Defendant of the names of the proprietors or proprietor of the *Pall Mall Gazette* and *Pall Mall Budget* on the days when the inculpated numbers were issued, in order the more effectually to enable him to bring and carry on an action in a Court of Common Law for damages sustained by the Plaintiff by reason of the said libellous matters respecting him. The statements in the bill shew that the Plaintiff instructed his solicitor to bring an action for the libels complained of against the proprietor or proprietors of the newspapers; that the Plaintiff's

solicitor applied to a person whom he supposed to be the proprietor, and was referred to a solicitor, who declined to state—or, at least, did not state, when asked to do so—the name of the proprietor or proprietors, but suggested, as the usual and proper course, that the action should be brought against the publisher (the present Defendant), on whose behalf he was willing to meet it. The bill does not set out the alleged libels, and in fact contains no more distinct allegation as to their nature and character than what I have already mentioned, though it appears incidentally from the correspondence stated in it, that the pages of the publications in which the alleged libels occur have been pointed out to the Plaintiff's advisers. There is also no distinct statement of the Plaintiff's intention to bring an action, or of his ignorance of the proprietors' names. The deficiency of allegation in these respects was, however, not strongly insisted on at the hearing, probably because they could be obviated by amendment. The first of them might be of some general importance, as a matter of pleading, but for the anomalous and unusual nature of the suit. If the defence were the legitimate one, that the alleged libel is not a libel, the mode of pleading here adopted might place the Defendant at considerable disadvantage. It is to be gathered, however, from the correspondence, that this is not the objection intended to be insisted on in this Court, and as a matter of fact it was not pressed in the argument. Under these circumstances, and not without considerable hesitation, I hold that there is in the present case just sufficient allegation in the bill to save it from a general demurrer, if in substance the Plaintiff has a right to the discovery he asks.

The objection to his right, as I understand it, is thus put: It is said that when the Legislature gave the right of filing a bill of discovery in certain cases, it must be taken to have authorized a bill which shall be subject to the ordinary rules governing such bills in this (the natural) Court for filing them, one of which is that the bill can only be maintained against a person who is, or is to be, a party to the record at law, and not against a witness whose evidence may go to charge some third person. And it is said that any other construction would enable a person complaining of a libel in a newspaper to file a bill against any

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human being, whether connected with the newspaper or not, for the purpose of discovering the names of the proprietors, if accidentally known to him. It seems to me that these objections cannot succeed. In the first place, it is to be observed that this is a bill of discovery, to be filed "in any Court." When the clause was first enacted, the Court of Exchequer in Equity (in which, it may be observed, witnesses were, for some purposes, considered proper Defendants to bills of discovery) was in existence as a general Court of Equity. But the expression "in any Court" cannot be cut down to the Courts of Chancery and Exchequer, since, when the clause was re-enacted, the latter was not a general Court of Equity. The Legislature can, perhaps, have hardly intended to give a person complaining of a libel a right to file a bill of discovery for the purpose in question in Courts having no practice and no machinery applicable to such bills. Still to read the expression "bill of discovery" as importing into the clause the special rules of the Court of Chancery, would seem a little unreasonable, when the bill may be filed in any Court. Moreover, the Act seems to presume that the bill authorized by it would be pleadable or demurrable to if not protected by the enactment. And in any case the very object of it must have been to enable the Plaintiff to extract from the Defendant the name or names of some person or persons other than himself who might be sued at law (though, according to the Defendant's contention here, not alone or otherwise than in conjunction with the Defendant in equity). The supposition that if the Plaintiff knows the name of one proprietor he can make him tell the names of all the others, but that, not knowing one name, he cannot get the information from the printer and publisher, who is the agent of the proprietors, and is put forth to stand between them and the public, is one that does not commend itself to one's common sense, and is not to be accepted without absolute necessity. It is not necessary to consider whether the enactment would cover the case of a mere witness in the strictest sense of the word; that is, of a person accidentally knowing the names of the proprietors, but wholly unconnected with the newspaper. I merely rule that by force of this enactment a person complaining of a libel in a newspaper may file a bill against the printer and publisher to ascertain the names of the proprietors

for the purpose of bringing his action against the proprietors alone. And I do so because any other conclusion seems to me inconsistent with the spirit and intention, as well as with the words, of the statute. I, therefore, overrule the demurrer.

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Solicitors: Mr. *W. M. Hacon;* Mr. *F. Robinson.*

SINGER *v.* AUDSLEY.

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[1871 S. 219.]

Practice—15 & 16 *Vict. c.* 86, *s.* 40—*Ord. of Feb. 5th*, 1861, *r.* XIX.—*Motion—Affidavit—Order—Cross-examination—Costs.*

Where a motion is ordered to stand on certain terms till the hearing of the cause, no new evidence can be filed by the parties on the motion, which must be dealt with at the hearing in the manner in which it was originally brought on; and if the motion stands over in consequence of an affidavit of the Defendant, the motion is not "a matter depending in" or "a proceeding before" the Court, which entitles the Plaintiff to cross-examine the Defendant on his affidavit; even although the Plaintiff may have given notice that he is going to use it at the hearing of the cause.

Where the Court orders a motion to stand till the hearing of the cause, it simply reserves to itself the power of dealing with the costs of it differently from the costs in the cause.

MOTION.

The bill in this suit was filed on the 9th of October, 1871, for an injunction to restrain the Defendant from using posters like those of the Plaintiff, and infringing his trade-mark. The Defendant swore two affidavits—one on the 31st of October, 1871, and another on the 1st of November—which were filed on the 2nd of November. A motion for an interim injunction was made on the 9th of November, but no other order was then pronounced than that the motion should stand over, on an undertaking, till the hearing of the cause. On the 15th of November the Defendant's solicitor was served with a notice to produce the Defendant, that he might be cross-examined on his affidavits on the 5th of December following. On the 17th of November the solicitor demanded thirteen guineas for the expense of bringing the Defendant from *Bradford* to *London* for the cross-

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examination; and he was afterwards paid ten guineas for it. On the 5th of December the Plaintiff's solicitor attended before the Examiner, but the cross-examination was adjourned till the 22nd of December. Subsequently to that day the Defendant's solicitor demanded, and was paid, the further sum of ten guineas for the expenses of the cross-examination to be taken on the 22nd of December. On the 22nd of December the Defendant attended before the Examiner, but declined to be sworn. He insisted that he could not be cross-examined on the affidavits, because, first, they had been used on the motion for the injunction; and, secondly, an order had been made in consequence of them. The Plaintiff, however, contended that he meant to use the affidavits at the hearing of the cause—of which intention he had given notice—and that, till then, there was a "cause or matter depending in, or a proceeding before, the Court" with respect to which he was at liberty to cross-examine the Defendant. The Examiner referred the matter to the Court.

The Plaintiffs now, therefore, moved for an order that the Defendant might, at his own expense, at such place and time as the Examiner should appoint, attend and be sworn and cross-examined on behalf of the Plaintiffs on the affidavits, and then and there, at his own expense, produce all documents in his possession or power relating to the matters referred to in the affidavits, or either of them, or that in default he might stand committed; and further, that the Defendant might pay the costs occasioned by his aforesaid refusal, and of that application.

Mr. *Horton Smith*, for the Plaintiffs:—

This is a case in which there is a matter clearly "depending" before the Court within the 15 & 16 Vict. c. 86, s. 40, and the Order of the 5th of February, 1861, Rule XIX. The motion for the injunction has been ordered to stand over till the hearing, and, till then, is kept alive by the undertaking. It is, therefore, being not yet disposed of, clearly pending; and this evidence, by cross-examination, may be taken. At all events, the objection now insisted on by the Defendant should have been urged, if at all, when first he came up to be cross-examined; and, certainly, before he had received the twenty guineas. As it is there is a clear waiver.

Mr. *Rigby*, for the Defendant:—

It is not in accordance with the regular practice of the Court to cross-examine a party, where the matter is so situated, as in this case. Here has been a notice of motion given for an interim injunction; the motion opened, and heard at great length; and an order made directing the motion to stand over, on an undertaking, till the hearing of the cause. If, in that state of things, there is new evidence before the Court—by direction of the Court itself—possibly such new evidence so adduced might be the subject of cross-examination. But the authorities are clear, that unless the cause is at issue, or there is some interlocutory application actually before the Court, the mere filing of an affidavit by a party to the cause does not entitle the other to cross-examine him on it. If it can be done at all, it must be under the 15 & 16 Vict. c. 86, s. 40, and the Order of the 5th of February, 1861, Rule XIX. But the cases on that section and order do not support this motion. *Lloyd* v. *Whitty* (1) was a different case from this; for there the motion was ordered to stand over, "with liberty to bring an action." *Kay* v. *Smith* (2) was supposed to be in favour of a motion such as this; but it was distinctly disapproved of, if not overruled, in *Manby* v. *Bewicke* (3). But in the *Catholic Printing and Publishing Company* v. *Wyman* (4) notice had been given by the Defendants to cross-examine the Plaintiff's solicitor on an affidavit; after which, and before the cross-examination took place, an order was made to amend the bill in the suit. The Plaintiffs objected to the proposed cross-examination; and a motion for an order to cross-examine the solicitor was refused with costs. *Hooper* v. *Campbell* (5) is to the same effect. A similar question arose in *Ooddeen* v. *Oakley* (6). In *Clarke* v. *Law* (7) the Defendant, after replication filed, and the appointment of a special Examiner, and pending the examination, gave notice of his intention to read at the hearing of the cause, an affidavit made by him, on an interlocutory application in it. He was ordered to be cross-examined. But in the present case there is no such notice.

(1) 19 Beav. 57.
(2) 20 Ibid. 566.
(3) 8 D. M. & G. 470, 2 Jur. N.S. 672.
(4) 11 W. R. 399.
(5) 13 W. R. 1003.
(6) 2 D, F. & J. 158.
(7) 2 K. & J. 28, 2 Jur. N.S. 278

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In *Coles* v. *Morris* (1) Vice-Chancellor *Malins* had refused to take certain depositions off the file, and gave leave to the Defendants to cross-examine; and Lord *Cairns* dismissed an appeal from that decision. He thought, however, that the original filing of the depositions was irregular. But the case is clearly distinguishable from this one.

The statute only applies (with respect to parties to suits) where, "in any cause or matter depending in the Court," "any party has made an affidavit to be used, or which shall be used, on any claim, motion, petition, or other proceeding before the Court." Now, no doubt, in one sense there is a matter depending in this case in the Court; because the motion for the injunction is not yet finally disposed of. But for the purpose of evidence, by way of cross-examination, a motion situated as this is, is not a "motion, petition, or other proceeding" now before the Court. If it were so, the Plaintiffs might go on adducing new evidence by filing fresh affidavits up to the very hearing of the cause. But the case of the *East Lancashire Railway Company* v. *Hattersley* (2) shews that the parties cannot, after a motion has been once opened to the Court, proceed to get new evidence upon it, although, of course, the Court may admit, or call for fresh affidavits, if it thinks right to do so: *Bird* v. *Lake* (3); *Cook* v. *Hall* (4). What the Plaintiffs here seek to do is, to cross-examine the Defendant on the whole merits of the case, and so determine whether or not they will go on with the suit. But that is a course which they are plainly not at liberty to adopt: *Wightman* v. *Wheelton* (5).

The VICE-CHANCELLOR:—Your main difficulty appears to me to be your client's receipt of the twenty guineas.

Mr. *Rigby*:—He will repay the money if he is not entitled to it. But that will not make it right that he should have been brought up for the cross-examination.

The VICE-CHANCELLOR:—As at present advised, I do not quite clearly see that there is, in principle, any distinction between the evidence sought to be obtained by this cross-examination and

(1) Law Rep. 2 Ch. 701.
(2) 8 Hare, 72, 86.
(3) 1 H. & M. 111, 119.
(4) 9 Hare, App. xx.
(5) 23 Beav. 397. 3 Jur. N. S. 124

new evidence. I understand the practice to be this: that where the hearing of a motion is ordered to stand over on certain terms till the hearing of the cause, no new evidence can be filed by the parties on the motion. The motion must be dealt with at the hearing in the manner in which it was originally brought on. Any other mode of treating it would be, as I think, not only irregular, but most inconvenient. The result is therefore nearly the same as if the only order made on the motion had been that the costs might be costs in the cause. The distinction seems to be only that the Court reserves to itself the means of dealing differently with the costs of the motion from the manner in which it may deal with the costs in the cause.

Mr. *Rigby*:—Then let us treat this case as one in which the Plaintiff has, though acting *bonâ fide*, made a mistake. My client has, through that mistake, been brought up to town from *Bradford* to attend a cross-examination which he should not have attended. There has been, in fact, "*communis* error."

Mr. *H. Smith*, in reply:—

In no case which has been cited was there any motion "actually pending" before the Court, in the correct sense of the word. Here there most distinctly is one; because the matter is kept alive by the undertaking. It is, therefore, *strictissime*, a pending motion. Due notice, also, has been given to the Defendant of the Plaintiff's intention to use the affidavits at the hearing; and they have been brought in regular course before the Examiner. Having, then, a motion, and an order that it shall stand on terms till the hearing, I submit that we have a pending motion before the Court, with respect to which this evidence may undoubtedly be taken. The whole matter is in train, so to say. It is going on—and you cannot stop it—till the Plaintiff brings it on upon the merits.

SIR JOHN WICKENS, V.C.:—

I have expressed my view as to the practice of the Court. I think the proper order to be now made is, that the Defendant do repay the twenty guineas: and subject to that, that the motion be dismissed without costs.

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No doubt there have been errors on both sides; but I am convinced that a motion situated as this is, is not a pending one for the purpose of such evidence as is here sought for.

Although there has been something like a waiver on the part of the Defendant, I doubt whether I ought to decide the case on that ground. I think, therefore, as there has been "*communis* error," that the proper order to be now made is the one I have stated.

Solicitor for the Plaintiffs: Mr. *J. N. Mason.*
Solicitor for the Defendant: Mr. *Seal.*

V.-C. W. 1872 *Jan.* 27.

HOLLAND *v.* HOLLAND.

[1872 H. 16.]

Partition Act, 1868 (31 & 32 *Vict. c.* 40)—*Pleading—Partition "or Sale"—Decree.*

A bill for a sale of property under the above Act ought to pray for a partition also.

Teall v. *Watts* (1) followed.

Aston v. *Meredith* (2) not followed.

THE Plaintiff in this suit was the owner of two-thirds, and the Defendant, an infant, the owner of the other third, of "an undivided one-fifth part or share of and in certain freehold property situate and being in *Bull Street, Birmingham.*"

The Plaintiff was desirous of having a sale of the property under the powers of the *Partition Act*, 1868.

The bill in the suit prayed a decree, "that the said undivided one-fifth part or share of the premises in *Bull Street, Birmingham*, of which *George Holland*, the testator in the suit, died seised, might be sold." It further prayed that an inquiry might be directed as to whether it was for the benefit of the infant that a sale of the premises, contemplated by an agreement of the 20th of December, 1870, should be carried into effect, and, if so, that the same agreement might be confirmed by the Court; and that, for the purposes

(1) Law Rep. 11 Eq. 213. (2) Law Rep. 11 Eq. 601.

aforesaid, all proper accounts might be taken, inquiries made, and directions given.

Mr. *Crossley*, for the Plaintiff, said it was for the benefit of all parties that the agreement of the 20th of December, 1870, should be confirmed by the Court, and the sale contemplated thereby carried out.

Mr. *Gazdar*, for the Defendant, submitted that the bill should have prayed for a partition, or in the alternative, for a sale; and not for a sale only: *Dart's* Vendors and Purchasers (1).

Mr. *Crossley* said the decisions upon the point were not uniform.

Mr. *Freeling*, *amicus curiæ*, mentioned that in *Teall* v. *Watts* (2) the Master of the Rolls had held, that in a suit for a sale under the Act the bill should pray partition as well as sale.

Mr. *Crossley* said, that in *Aston* v. *Meredith* (3) Sir *James Bacon*, V.C., had held that a sale might be decreed under the Act, although the bill contained no prayer for partition.

SIR JOHN WICKENS, V.C.:—

I think I may make the decree asked for by this bill. But the bill must be amended by adding to it a prayer for partition as well as sale.

Solicitors for all parties: Messrs. *Lambert, Burgin, & Petch.*

(1) Page 1075, Ed. 1871. (2) Law Rep. 11 Eq. 213.
(3) Law Rep. 11 Eq. 601.

V.-C. W.

1872

Feb. 13.

In re PALMER'S WILL.

Sale of Surface, Reserving Minerals—Petition by Trustees alone for Sanction of Court—Parties—Cestuis que Trust made Co-Petitioners—25 & 26 Vict. c. 108, s. 2.

The *cestuis que trust* ought to be made parties to an application under 25 & 26 Vict. c. 108, s. 2, for sale of the surface apart from the minerals.

A TESTATOR devised his real estate to trustees in trust for sale. The trustees, being desirous to sell the surface without selling the minerals lying underneath it, alone presented a Petition under the provisions of the statute 25 & 26 Vict. c. 108, s. 2, for the purpose of obtaining the sanction of the Court to such sale. On the Petition coming on to be heard, the Vice-Chancellor, after mentioning the case of *In re Brown's Trust Estate* (1), considered that the *cestuis que trust* ought to be parties to this application, and directed the Petition to stand over for the purpose of its being amended in that particular.

Mr. *Roupell*, for the Petitioners, now stated that the beneficiaries —the widow of the testator and her four children—had been made co-Petitioners, and that the evidence shewed that the proposed sale was expedient.

Sir J. Wickens, V.C., made the order.

Solicitors: Messrs. *White & Sons.*

(1) 9 Jur. (N.S.) 349; 11 W. R. 19.

Ex parte CROSSLEY. *In re* TAYLOR.

C. J. B.
1872
Feb 12. 19.

Bankruptcy Act, 1869, ss. 55–58, 96—*Bankruptcy Rules*, 1870, *Rules* 171, 243–251—*Examination of Trustee—Jurisdiction.*

Under sects. 72 and 96 of the *Bankruptcy Act*, 1869, and rule 171 of the Bankruptcy Rules, 1870, the Court of Bankruptcy has power, on the application of a creditor, to order a trustee to submit himself for examination.

23 L.D. 124
126

THIS was an appeal from an order of the County Court Judge of *Manchester*, dated the 8th of December, 1871, directing *Crossley* (the appellant), who was one of the trustees appointed under the bankruptcy of *Taylor*, to submit himself for examination.

Taylor, who was a merchant at *Manchester*, on the 17th of March, 1871, left *England* for *America*, and was adjudicated bankrupt on the 6th of April, and *Crossley* and *Cummins* were appointed trustees.

Prior to the appointment of the trustees *Frank Lee*, the cashier of the bankrupt, had been appointed receiver, and required to enter into a bond for £500. He never entered into that bond, and was continued in his appointment of receiver by the trustees, and it was alleged by *Woodhouse*, the Respondent, who was a creditor of the bankrupt, that *Lee* and *Crossley* were dealing with the bankrupt's estate in a way disadvantageous to the general body of creditors, and he desired to examine *Crossley;* the question before the Court was, whether the Court had power, on the application of a creditor, to compel a trustee to submit himself for examination as to his dealings with the bankrupt's estate.

Mr. *De Gex*, Q.C., and Mr. *Winslow*, for *Crossley*:—

The words in sect. 96 of the *Bankruptcy Act*, 1869, "on the application of the trustee," are inserted for the first time in that Act, and are intended to limit the right of examination to the trustee alone; and the scheme laid down in the Act is that the Comptroller should perform out of Court those duties as to the examination of the conduct of the trustee which used to be performed by the Court itself: Rule 251 of the Bankruptcy Rules, 1870. Under the present Act three special modes are

C. J. B. 1872 *Ex parte* CROSSLEY. *In re* TAYLOR.

provided for the examination of the trustee, and for his removal, if necessary: First, any creditor may bring the matter before the committee of inspection; secondly, he may summon a meeting of creditors under sect. 83, and by special resolution remove the trustee; or, thirdly, the conduct of the trustee may be brought to the notice of the Comptroller under rule 251. It would be most inconvenient, and in many cases very prejudicial to the general body of creditors, if any single creditor could compel a full disclosure in open Court by the trustee of all his dealings with the estate. Rule 171 can only be meant to apply to cases where no trustee has been appointed, and rule 242 is a direct authority to shew that the trustee is not bound to give information to a mere creditor, but only to the committee of inspection.

Mr. *Little*, Q.C., and Mr. *Finlay Knight*, for the Respondent:—

This appeal seeks to deprive the creditors of the right to have the trustee examined before the County Court Judge. There are two questions to be considered. First: Had the County Court Judge jurisdiction to take such examination before the Act of 1869? Secondly: If so, has that jurisdiction been taken away by that Act? Under sect. 120 of the *Bankrupt Law Consolidation Act*, 1849, the Court had power to summon before it for examination persons suspected of having any property of the bankrupt in their possession. *Cooper* v. *Harding* (1) and *Ex parte Alexander* (2) prove that creditors as well as trustees might apply to the Court under the above section. And the Court of Appeal will not interfere with the discretion of a Commissioner in requiring the examination of the trustee: *Ex parte Lawrence* (3). And the law was the same under the Act of 1861, sect. 136. Section 96 of the present Act is a re-enactment of the 120th section of the Act of 1849, with the addition of the words, "on the application of the trustee;" but the fact that a power is given to the trustee under this Act does not deprive the creditor of the right which he possessed before the Act was passed. By sect. 78 the right under the old law is preserved to the creditor, unless it can be shewn that it has been taken away by the rules. The fact that there is a new system of auditing

(1) 7 Q. B. 928. (2) 1 D. J. & S. 311.
(3) 1 D. J. & S. 307.

accounts under the Act of 1869, and rules 243, 247, does not take away from the creditor the right of examining the trustee: Rule 171. The other side do not object to the examination, but only to the way in which we propose to take it.

Mr. *De Gex*, in reply:—

All the old Acts relating to bankruptcy have been repealed, and all rights conferred by those Acts have consequently been destroyed, and this case must be decided on the present Act alone; and the 120th section of the Act of 1849, although to an extent it is re-enacted, yet is qualified by the insertion of the new words, in sect. 96, "on the application of the trustee. Rule 171 might refer better to sect. 19 than sect. 96, as the former section enacts "that the bankrupt is liable to perform the orders of the Court made on the application of the trustee or any creditor." Under sect. 120 of the Act of 1849 no assignee was ever summoned to give evidence, and sect. 136 of the Act of 1861 expressly provides for the examination of the assignee; and as there is no such proviso in the present Act, it would seem to be an intentional omission on the part of the Legislature.

SIR JAMES BACON, C.J.:—

The Court has full jurisdiction in all questions that may arise in bankruptcy, and it cannot be said that such jurisdiction is only to be exercised in certain ways. In sects. 66 and 72 of the Act of 1869 there is nothing to control or curtail the power of the Court of Bankruptcy; in this case an application in writing has been made under rule 171, and the Court has only to proceed to the investigation.

It has been said that by means of sects. 55–58 and rules 243–251 (which refer merely to audit) the Legislature has provided certain machinery to enable the trustee to be examined; whereas those sections and rules are merely useful provisions to prevent litigation, and are additional to the universal powers of the Court, but they have not the effect of depriving the Court in other respects of the power of exercising its general jurisdiction, or precluding the Court from entering into this common inquiry. [The learned Judge, after stating the facts, continued:—] This is a question

C. J. B. 1872 *Ex parte* Crossley. *In re* Taylor.

between a trustee and a *cestui que trust* which calls for the interposition of the Court, and an examination is required to ascertain whether justice has been done. The matter to be inquired into may be of vital importance, and because the person to be examined happens to be the trustee, is he to be excluded by virtue of his office from giving all the information in his power? Rule 171 is of just as much importance as sect. 96. It has been said that if this examination is made it will be a precedent for annoying trustees, but it must be remembered that the extent of the examination is under the control of the Court. I see no reason why in these cases the trustee should not answer fully and substantially in every way that the Court may think requisite.

Appeal dismissed with costs.

Solicitors: Messrs. *Pritchard & Englefield*, agents for Messrs. *Grundy & Coulson, Manchester;* Messrs. *Allen, Colley, & Edwards*, agents for Mr. *Storer, Manchester.*

In re PARNHAM'S TRUSTS.

M. R.
1872
Feb. 10, 12.

Will—Clause of Forfeiture—Bankruptcy—Annulment.

By a will a fund was given (subject to a prior life interest) to *R.* for life, but it was provided that if (amongst other things) by act or operation of law he should be personally deprived of the receipt and benefit of the bequest, then the life interest should cease, and the income should go to the persons entitled in remainder. At the time of the determination of the prior life interest, and for several years afterwards, *R.* was a bankrupt, and in consequence of such bankruptcy the fund was paid into Court under the *Trustee Relief Act.* Before any petition was presented for payment of the fund, or application of the income thereof for the benefit of the persons entitled in remainder, *R.* procured the annulment of this bankruptcy on the terms that the past dividends should be paid to the assignee:—

Held, that *R.* had nevertheless forfeited his life interest.

White v. *Chitty* (1) and *Lloyd* v. *Lloyd* (2) distinguished.

WILLIAM PARNHAM, by his will, dated the 26th of October, 1854, devised his copyhold estates to his brother, *John Parnham*, for life, and after his decease empowered *Thomas Garniss* and *Joseph Muskett Yetts*, or the survivors of them, or his heirs, to sell the same in manner therein mentioned; and the testator gave the money to arise from such sale, after payment thereout of all expenses attending the sale, unto and equally between the children of the testator's sister, *Elizabeth Ridley*; and the testator further gave and bequeathed unto *John Parnham* and *Thomas Garniss*, their executors, administrators, and assigns, all the stock in the £3 per Cent. Consolidated Bank Annuities of which he should be possessed at the time of his death, upon trust, to pay the dividends thereof to *Elizabeth Green* during her life, and after her death to divide the same equally between the children of his said sister, *Elizabeth Ridley*, for their absolute use and benefit.

By a third codicil to his will, dated the 12th of April, 1861, the testator revoked the aforesaid bequests, so far as they related to the sons of *Elizabeth Ridley*, and directed the trustees of the shares of the proceeds of sale of the copyholds and of the stock, in which, but for that codicil, the sons of *Elizabeth Ridley* would have

(1) Law Rep. 1 Eq. 372. (2) Law Rep. 2 Eq. 722.

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taken an absolute interest, to stand possessed thereof after the decease of *John Parnham* and *Elizabeth Green* respectively, upon trusts for investment and payment of the income equally between the sons of his said sister during their respective lives, so long as they respectively should not do any act, as thereinafter mentioned, to deprive themselves respectively of the benefit thereof; and the testator declared that it should not be lawful for any one of his said sister's sons to assign, charge, or otherwise dispose of, by way of anticipation, the interest, dividends, and income to which he might become entitled as aforesaid; and in the event of any one or more of the said sons of his said sister assigning or otherwise disposing of the life interest thereinbefore given, or if by act or operation of law he should be personally deprived of the receipt and benefit of the aforesaid bequests, then and in any of these cases his life interest should immediately cease, determine, and become void; and, on such event occurring, the said dividends, interest, and income should be paid to the person or persons entitled to the same under the bequest thereinafter contained; and from and after the decease of each son of his said sister, or upon the happening of any of the events thereinbefore mentioned, by which he might be deprived of the benefit thereof, the principal money, income, and dividends should become divisible amongst all and every the children of such son, and be payable to such children or child at their respective ages or age of twenty-one years; and in case of the death of any one or more of the sons of his said sister, without leaving any child or children him surviving, or born in due time afterwards, then the testator gave the principal of the funds in which such son was to have such life interest, subject to be determined as aforesaid, and the dividends, interest, and income thereof, to the daughters of his said sister, share and share alike.

The testator died on the 16th of January, 1862.

On the 19th of August, 1864, *Richard Ridley*, one of the sons of *Elizabeth Ridley*, was adjudicated a bankrupt.

On the 4th of October, 1864, *John Parnham*, the tenant for life under the will of the testator's copyholds, died. Soon afterwards the copyholds were sold, and in July, 1865, the share of the rents of the copyholds accrued in the interval between the death of *John Parnham* and the sale, and of the proceeds of sale, to which,

but for his bankruptcy, *Richard Ridley* would have been entitled for life, was paid into Court under the *Trustee Relief Act.*

On the 20th of June, 1867, *Elizabeth Green*, the tenant for life under the will of the testator's consols, died. In October, 1867, the share of the consols to which, but for his bankruptcy, *Richard Ridley* would have been entitled, was paid into Court under the *Trustee Relief Act.*

By an indenture dated the 13th of November, 1871, *Richard Ridley* assigned to the assignees in his bankruptcy all the dividends which had then accrued on the two funds in Court. On the 21st of November, 1871, the bankruptcy of *Richard Ridley* was annulled. Immediately afterwards he presented this Petition, praying for payment of the past dividends on the fund in Court to the assignees in his bankruptcy, and of the future dividends to himself.

Richard Ridley had no child who had attained twenty-one.

Mr. *Miller*, Q.C., for the Petitioner:—

The Petitioner's bankruptcy was annulled before any one came in and claimed the income, and consequently the Petitioner is now entitled to receive the income: *White* v. *Chitty* (1); *Lloyd* v. *Lloyd* (2).

Mr. *Fry*, Q.C., and Mr. *Batten*, for daughters of *Elizabeth Ridley* and persons claiming through them:—

The cases cited proceed on the principle that if a bankruptcy is annulled in the interval between the time when the title to a fund accrues and the time when it becomes payable, the bankrupt is in the same position as if he had never been bankrupt, and is entitled to receive the fund, if it has not been intercepted in the meantime; but they do not decide that a bankrupt may remain out of possession for ever so long a time, and then come and claim the fund. This view of the cases is borne out by *Trappes* v. *Meredith* (3) In this case the material times to be considered are those at which the first dividend on the two funds became payable; at those times the Petitioner was bankrupt, and in fact the payment into Court was occasioned by the bankruptcy. How can it be said, under those circumstances, that the fund was not intercepted?

(1) Law Rep. 1 Eq. 372. (2) Law Rep. 2 Eq. 722.
(3) Law Rep. 9 Eq. 229.

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It was decided, in *Manning* v. *Chambers* (1), that words in a will, in terms referring to future bankruptcies, extend to a bankruptcy anterior to the testator's death, and that a forfeiture of the interest intended to be given by the will may thus be created. The intention of the testator is supposed to be that the interest shall be enjoyed personally by the legatee. Where the legatee cannot so enjoy it, there is a forfeiture; where he can so enjoy it, by procuring an annulment of his bankruptcy, there is no forfeiture, as was decided in *White* v. *Chitty* (2) and *Lloyd* v. *Lloyd* (3). Applying that principle here, the question is, will *Richard Ridley* personally enjoy the interest in the fund? The answer is No, for by arrangement the past dividends are to be handed over to the assignee in his bankruptcy.

Sir *R. Baggallay*, Q.C., and Mr. *Tyssen*, for the trustees.

Mr. *Miller*, in reply:—

The supposed distinction, relied on by Mr. *Fry*, was taken in *Lloyd* v. *Lloyd*, and disregarded. There is nothing in the cases to support the argument founded on the arrangement with the assignee. The payment of the fund into Court cannot affect the matter any more than if it had been retained by the trustees. The point of time to be regarded is that at which payment is made to a person entitled.

The assignment of the 13th of November, 1871, relates only to past dividends, and cannot create a forfeiture.

Feb. 12. LORD ROMILLY, M.R.:—

I am of opinion that this is a clear case of forfeiture, and that the rents and dividends, which would have come to the Petitioner but for his bankruptcy, have been intercepted by the person to whom they were given in that event. I agree that the payment into Court cannot affect the question; but the payment to or retention by the trustees is a clear interposition, and they hold and accumulate the income exactly as the testator has directed in the case of bankruptcy.

(1) 1 De G. & Sm. 282. (2) Law Rep. 1 Eq. 372. 12 Jur 181.
(3) Law Rep. 2 Eq. 722.

The cases, therefore, of *White* v. *Chitty* and *Lloyd* v. *Lloyd* have no application, or rather the reasons given for those decisions shew that there is a forfeiture in the present case.

The Petition must be dismissed with costs.

M. R. 1872 *In re* PARNHAM'S TRUSTS.

Solicitors: Mr. *Hendriks*; Mr. *J. M. Yetts*.

HUDSON *v.* COOK.

M. R. 1872 *Feb.* 15.

[1870 H. 131.]

Sale of Real Estate—Power to rescind—Death of Purchaser before Completion—Rescission—Rights of Heir.

An intestate was, at the time of his death, under a contract to purchase realty, which the vendor might have specifically enforced, but which he afterwards rescinded under a power thereby reserved to him:—

Held, that the heir-at-law of the intestate was entitled to receive the purchase-money out of the intestate's personal estate.

ON the 2nd of September, 1868, *John Hudson* became the purchaser by public auction, at the price of £910, of certain hereditaments described in the particulars of sale as "an inclosed allotment of land at *Shotover*, with a brick yard, two kilns, and drying shed," containing 12A. 3R. 0P., of which 2A. 1R. 10P. is freehold, and the remainder copyhold of inheritance of the manor of *Headington*, in the county of *Oxford*." The conditions provided that the sale should be completed on the 21st of December, 1868, that all objections and requisitions on the title not made in writing and delivered to the vendor's solicitor within fourteen days of the delivery of an abstract which should suggest the same should be deemed to be waived, and that, in this respect, time should be of the essence of the contract; and that if any objection or requisition should be made to or on the title which the vendor should be unable or unwilling to remove or comply with, he should be entitled, notwithstanding any intermediate treaty or negotiation, to rescind the contract and to return the deposit-money without interest or expenses; and that if any mistake should be made in the description of the property, or any error should appear in the

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particulars of sale, such mistake or error should not annul the sale, but a compensation should be taken or given as the case might require.

On the 30th of September an abstract of title was delivered, by which it appeared that the property was being sold by one *William Savours Powell*, the heir-at-law of *William Powell*.

On the 12th of October requisitions were delivered on behalf of the purchaser, which (amongst other things) required that *William Savours Powell*, who had not been admitted to the copyhold property, should be admitted at his own expense. The reply to this requisition, delivered on the 17th of October, was that he would be admitted before completion.

Subsequently, in November, 1868, it was discovered that the property comprised 3A. 3R. 10P. freehold, and that of the copyholds, part was held of the manor of *Headington*, and part of the manor of *Heddington*. There was some difficulty in distinguishing these different parts, and consequently in ascertaining to what precise portion of the property *William Savours Powell* ought to be admitted tenant of the manors. By reason of this and other difficulties the purchase was not completed on the 21st of December, 1868.

On the 16th of January, 1869, *John Hudson* died intestate. It was for a long time uncertain who was his heir-at-law and customary heir; ultimately the Plaintiff (who was, at the death of the intestate and for several months afterwards, resident in the colony of *New Zealand*), succeeded in establishing his title as such. In the meantime, in April, 1869, before the Plaintiff had asserted his title, the vendor rescinded the contract under the power reserved therein, alleging as his reasons his inability to comply with the requisition as to the admission of *William Savours Powell*, and his unwillingness to incur further delay. The property was immediately afterwards sold to another person.

The Plaintiff instituted this suit against the legal personal representatives of the intestate, seeking for payment of the purchase-money of £910 out of the intestate's personal estate.

By their answer the Defendants submitted that the Plaintiff had not sufficiently proved his heirship. They admitted assets, but submitted that the Plaintiff was not entitled to payment thereout.

The Plaintiff proved his title as heir in this suit.

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Mr. *Southgate*, Q.C., and Mr. *Davenport*, for the Plaintiff:—

At the time of the intestate's death he was bound by a contract which the vendor might have specifically enforced against him, and the heir-at-law is entitled to the benefit of that contract: *Garnett* v. *Acton* (1); *Whittaker* v. *Whittaker* (2); *Broome* v. *Monck* (3); *Curre* v. *Bowyer* (4).

Sir *R. Baggallay*, Q.C., and Mr. *F. P. Morris*, for the Defendants:—

We admit the authority of the cases cited, and we also admit that if the contract was put an end to for reasons arising out of the state of the intestate's family or estate, then the Plaintiff is entitled.

A contract may be rescinded in two ways: first, under a power reserved by the contract to the vendor; secondly, by reason of the conduct of the purchaser. In the former case, rescission puts an end to the contract *in toto*, and puts the parties in the same position as if the contract had never been made; in the latter it does not, and if there is a binding contract at the death of the testator, all the authorities cited apply. But this is a widely different case: the vendor has rescinded under his power; the contract was thereby avoided *ab initio;* and the result is the same as if the contract had never been entered into.

But, further, we say that at the time of the intestate's death there was no binding contract. The case of *Broome* v. *Monck* shews that if there was at that time an objection which the purchaser might have taken, the claim of the heir is excluded. Now here the purchaser contracted to buy 2A. 1R. 10P. freehold and 10A. 1R. 30P. copyhold. It turns out that the freehold part comprises 1A. 2R. 0P. additional; that is a different thing from what the purchaser contracted to buy, and he is entitled to rescind: *Ayles* v. *Cox* (5).

LORD ROMILLY, M.R.:—

The only question in this case is, whether on the 16th of

(1) 28 Beav. 333.
(2) 4 Bro. C. C. 31.
(3) 10 Ves. 597.
(4) 5 Beav. 6.
(5) 16 Beav. 23.

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January, 1869, the vendor could have specifically enforced this contract against the intestate.

A vendor may be justified in putting an end to a contract in consequence of delays which occur, and in this case the absence of the heir caused delay which might have been a very serious evil to the vendor. But that does not in the slightest degree affect the question; nor does the right of the vendor to put an end to the contract in the slightest degree affect the right of the heir-at-law to insist upon the benefit of the contract, assuming that the vendor might, if he had been otherwise minded, have specifically enforced the contract against the intestate. Now I do not think that the circumstance of part of the property being freehold and part of it being copyhold is of much consequence, because, according to the conditions of sale in the first instance, the intestate bought partly freehold and partly copyhold property; it turns out that this is true, but that the amounts of each differ from what is stated; but the only consequence is, if the whole is not conveyed to him according to the contract, that there might be a question as to compensation, but it would not set aside the sale or make it a bad contract, which it would be if the whole had been sold as copyhold only or as freehold only. Nor do I think that there is anything to shew that the title was bad. The absence of the heir-at-law of the intestate made a difficulty about the admission to the copyholds: but that does not in the slightest degree affect the question, as was shewn very clearly in the case of *Broome* v. *Monck*. The principle in all these cases is, that where a contract is entered into between an intestate and another person, and the contract has not been completed at the intestate's death, the money and the land are to go as if the contract had been actually carried into execution, and I think the Plaintiff is entitled to have the money which would have been applied in the purchase given to him instead of the land itself. I am also bound to say that, as the Plaintiff has made out his claim against the personal estate, the costs must follow the event. In saying that I do not mean to impute the slightest impropriety to the administrator in requiring the Plaintiff to prove his title very clearly.

Solicitors: Mr. *John Philpot;* Messrs. *Hayes, Twisden, Parker, & Co.*

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Feb. 23.

[1871 J. 32.]

Injunction—Secret Preparation—Use of Name of Discoverer—Advertisement as "only" Genuine.

Any person who has, without the use of unfair means, become acquainted with the mode of compounding a secret unpatented preparation may, after the death of the original discoverer, make and sell the compound, describing it by the name of the discoverer, provided he does not lead the public to suppose that his preparation is the manufacture of the successors in business of the original discoverer; but he must not assert that his is the only genuine article, or suggest that the article manufactured by the successors of the original discoverer is spurious.

PREVIOUSLY to 1833, *Robert James*, a lieutenant in the army, discovered the secret of a chemical preparation, or ointment, which became widely known as "Lieutenant *James*' Horse Blister," and is extensively used in the cure of certain injuries to horses. The discovery was never patented.

Robert James, the discoverer, died in 1865. Under or by virtue of certain deeds executed by him in his lifetime, the whole benefit of his invention, together with the exclusive right of signing his name on the labels placed on the ointment, had become vested in the Plaintiffs, *Robert Swan James* and *James James*, as trustees for the benefit of the families of the discoverer and one of his brothers. *Isabella James*, one of the beneficaries under these deeds, was joined as co-Plaintiff in this suit with the said trustees.

The Defendant *Robert Joseph James* was a son of the Plaintiff *Robert Swan James*, and had been employed by him for some time previously to 1865 in manufacturing the blister, and while so employed had, as the bill alleged, become acquainted with the secret, but had been strictly enjoined by his father, and was under an implied promise, not to disclose it to any person. Such injunction and promise were however denied by the said Defendant.

Some time in 1867 the Defendant *Robert Joseph James*, in conjunction with his co-Defendant, *Vernon Southee*, began to manu-

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facture an ointment, and to sell and advertise it as "Lieutenant *James*' Horse Blister." About the same time he dropped his second name of *Joseph*, and called and signed himself *Robert James* only; and he placed such signature on the labels annexed to the pots of ointment manufactured and sold by himself and his co-Defendant. Such pots, in size, form, colour, and general appearance, resembled those used by the Plaintiffs; and the directions for use which accompanied the pots of the Defendants were almost a verbatim copy of those which accompanied the pots of the Plaintiffs. The Defendants' pots, however, had a horse's head delineated on the top. This mark did not appear on the Plaintiffs' pots, on which the signatures of the Plaintiffs *Robert Swan James* and *James James* were placed in addition to that of the inventor, *Robert James*.

The form of advertisement used by the Defendants was in part as follows:—

"Horses.—Lieutenant *James's* Blister, manufactured by *Robert James*, the grandson of the inventor, and made by him for Lieutenant *James* for several years and up to the time of his death in 1865. Used in all the leading studs in *Great Britain* and on the Continent, and after thirty-six years general use universally admitted to be the best blister ever made. The public are cautioned against a spurious imitation of this blister. None is genuine without the trade-mark—a horse's head—on the top of each pot, and the signature '*Robert James.*'"

The Plaintiffs, on the other hand, both before and after 1867, issued advertisements containing the following passage:—"Caution.—None is genuine without the signature of the proprietors on the top label of every pot, to counterfeit which is forgery." Subsequently to 1867 the Plaintiffs issued advertisements stating that the "only genuine" ointment was to be had at certain agents of theirs therein named.

The Defendants had recently issued circulars containing testimonials, as to the value of the preparation known as "Lieutenant *James*' Horse Blister," two of which were from the Adjutant-General of the Cavalry, and from Professor *Coleman* of the *Veterinary College;* and the third was an extract from the monthly

Journal of Veterinary Science. These were all given in the first instance with reference to the preparation of the original discoverer.

Under these circumstances, the bill was filed to restrain the Defendants from selling any ointment under the name of Lieutenant *James'* Horse Blister, or from using the name of Lieutenant *James* as part of, or in connection with, any labels affixed upon any pots of ointment sold by or on behalf of the Defendants, or either of them; and from selling any pots of ointment, and from using or circulating any handbills, testimonials, or certificates of merit similar to, or copied from, or being merely a colourable imitation of, the pots of ointment sold, or the handbills, testimonials, or certificates used or circulated by the Plaintiffs; for an account, and for delivery up and cancellation of the labels, handbills, testimonials, and certificates complained of.

The cause now came on to be heard.

The *Solicitor-General* (Sir *G. Jessel*), and Mr. *Cookson*, for the Plaintiffs:—

Putting aside the question whether the Defendant did or did not obtain the secret by a breach of trust, we admit that the Defendant is entitled to say that he makes a preparation which is as good as that made by the Plaintiffs, or as good as that known as "Lieutenant *James'* Horse Blister," or even that the preparation he makes is compounded in the same way as "Lieutenant *James'* Horse Blister," but he must not advertise it as being "Lieutenant *James'* Horse Blister." That, in effect, is asserting it to be manufactured by the Plaintiffs, who alone are entitled to use the name of the discoverer as the designation of the preparation manufactured by them. A person may manufacture "long cloths," and may say that they are as good as "*Horrocks'*;" but he must not sell his manufacture as "*Horrocks'* Long Cloths." In some cases the name of the original maker of a preparation has become the trade name of the article; as, for example, in the case of "*Harvey's* Sauce;" but here the preparation has never, so far as appears, been manufactured by any persons other than the Plaintiffs and the Defendants, and there is no ground for holding that "Lieutenant *James'* Horse Blister" has become a mere trade name. All the circumstances go to shew that there is a deliberate attempt to

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mislead the public on the part of the Defendants. The principles laid down in *Cocks* v. *Chandler* (1) govern the case.

Further, we say that we are entitled to an injunction on the ground of breach of trust: *Yovatt* v. *Winyard* (2); *Morison* v. *Moat* (3).

6 Ch D 578

LORD ROMILLY, M.R.:—There are two points upon which I wish to hear the Defendants. I think they must not use the name of *Robert James* simply, but must put *Robert Joseph James*. I also think they must not, in any advertisement or in any circular, use any expression which asserts or suggests that the thing manufactured by the Plaintiffs is either spurious or not genuine. I will state my reason for that. First, I am of opinion that when a person has discovered a valuable invention, and has not patented it, any one who has discovered the ingredients (I am not talking of the case of a breach of trust, or of fraud, or the like) may sell those ingredients, and may use the name of the person who has discovered them after his death, but not in his lifetime, so as to suggest they are made by him. In this case Lieutenant *James* discovered a process for making a very valuable blister for horses. As soon as he died that became a matter of commercial trade, and any person might make Lieutenant *James'* blister for horses after that time, provided he had got the prescription for that purpose properly and fairly. Any one who, in the course of the business, has ascertained how it is made, and chooses to state to the public that he has heard how Lieutenant *James'* blister for horses is made, in my opinion is entitled to publish himself as making Lieutenant *James'* blister for horses, provided he does not say anything to shew that it was made by the person to whom Lieutenant *James* has left his property. If there had been a question of fraud, or the Defendants were acting contrary to an agreement, by which they were not entitled to do what they have done, then the Court would interfere; but that is not the question here, for what the Plaintiffs in this case really complain of is not of the Defendants' making the preparation, but of their calling it Lieutenant *James'* Blister. I am of opinion they are entitled to call it Lieutenant *James'* Blister, because it has acquired

(1) Law Rep. 11 Eq. 446. (2) 1 Jac. & W. 394.
(3) 9 Hare, 241.

that title in the commercial world in the same manner as the *Reading* Sauce or *Harvey's* Sauce. Anybody has a right to sell sauce as *Harvey's* Sauce, provided he does not suggest that it is made by the original proprietor, or take the name of *Lazenby* or the like, or say that it is the original *Harvey* Sauce that he is making. In all those respects I am of opinion the Court would interfere; but if in every respect the preparations of the Plaintiffs and the Defendants are exactly the same, and if the fact of the Defendants having got those ingredients together is not untrue (for otherwise they might be restrained), then they may use the name which that blister bears in the market; but they cannot say that it is made by the Plaintiffs, or use their names for that purpose. I am, therefore, of opinion that they are not at liberty to put the name of *Robert James* upon their labels and upon their pots (subject to what I may hear from Sir *Richard Baggallay* upon that), because that is asserting that theirs is the actual blister which belonged to *Robert James*. The Defendants must not lead the public to suppose that this is actually the manufacture of *Robert James* himself; they must put the words *Robert Joseph James* on their labels; and they must not make the labels so much alike as to make them appear to denote that the article is made by *Robert James*. The Defendants may use the words "*Robert James*" as indicating it is *Robert James'* blister, as they may use the words "Lieutenant *James'* blister;" but they must not use anything that looks like a signature to shew that *Robert James* is the manufacturer or owner of that particular article. In that respect I think they are wrong; and I am also of opinion that they are wrong in asserting that theirs is the only Lieutenant *James'* blister, or in asserting that the Plaintiffs' preparation is not genuine. The Defendants are not entitled to cast any slur upon the Plaintiffs, who are the persons who have derived from the original inventor the right to the property, and the right to make the blister. I will also state this, that the Defendants having a right to sell the goods, have a right to praise them as much as they like, and, therefore, to use the testimonials and every comment which praises the goods.

Sir *R. Baggallay*, Q.C., and Mr. *Townsend*, for the Defendants, said that they were ready to alter their labels and advertisements

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in the two particulars mentioned by the Master of the Rolls; but pointed out, as to the first, that the name "*Robert James*" formed no part of the Plaintiffs' trade-mark, and that the use of that name by the Defendants was not sought to be restrained by the bill; and as to the second, that the Plaintiffs were themselves in the habit of advertising their preparation as the only genuine, and could not complain of the Defendants doing the same thing.

LORD ROMILLY, M.R.:—

Upon this part of the case I am against the Defendants. The latter part of the argument opens a question which I do not know has ever been determined, and which it is quite clear that I could not determine in this case. Lieutenant *James* discovered a valuable ointment for blistering horses. He assigns it to persons who carry on the business and sell his blistering ointment, there being nobody else in the field, and they state, with perfect propriety, that the only genuine one is theirs. Another person gets the recipe in such a form that he is entitled to use it; and thereupon he says, "I am the only genuine one." I am of opinion that he is not entitled to say that; but is he thereupon entitled to file a bill, and call upon the others to alter their advertisements? I do not know that that has ever been determined: all I can say is, that that would be relief which I could not give in this suit. I am satisfied the Defendants are not entitled to say theirs is the only genuine blister ointment. The expression in the Plaintiffs' advertisement is, that none is genuine without the signature of the proprietors is on the top label of every pot, to counterfeit which is forgery. This is perfectly true. All that any other person is entitled to is to put his own name on the top of the pot. The assertion of the Defendants goes much beyond that, for they state this, that the public are cautioned against a spurious imitation of this blister. "None is genuine without the trade-mark—a horse's head—on the top of each pot, and the signature '*Robert James.*'" If by signature is meant the signature which I assume is supposed to be the facsimile of the original inventor, that is involved in the question of whether the Defendants have not merely a right to sell *Robert James'* or Lieutenant *James'* blister, but to use the signature of *Robert James*. It appears to me that that signature would

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lead the public to suppose that the article was prepared by the inventor himself, and I do not think the Defendants are entitled to do that. If the name of the original inventor had not been *Robert James*, I think the case would have been very different; but the name of the inventor being *Robert James*, and signed as such, I think that the Defendants' ointment ought to be sold in pots bearing the full signature of *Robert Joseph James*, and not the signature of *Robert James* alone. The Defendants allege that they had always signed as *Robert James;* but, upon the evidence, I am by no means satisfied that that is so. I think the Defendants ought to be restrained from using the name of *Robert James* alone, but they may use *Robert Joseph James* or *R. J. James*. I think they must also be restrained from saying, in any of their circulars or advertisements, that none is genuine without the trade-mark—a horse's head—on the top of each pot, and the signature *Robert James*, and from stating or inserting in their advertisements or circulars any words or expressions asserting or suggesting that the ointment manufactured and sold by the Plaintiffs is spurious. This is not a case in which I can give any costs.

Solicitors: Mr. *Sydney Gedge;* Mr. *R. Southee.*

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1872
Feb. 12, 13, 26.

[1870 B. 282.]

Vendor and Purchaser—Suit to rectify Conveyance—Mistake—Option to set aside Transaction.

The conveyance made in 1866, upon a sale of land by *S.* to *B.*, contained a reservation to *S.* of minerals. Four years subsequently *B.* filed a bill against *S.*, alleging that the reservation was inserted in the conveyance under a mistake common to both parties, and recently discovered by him, and praying for the rectification of the conveyance by the omission of it. *S.* put in an answer denying the mistake and claiming the benefit of the reservation; and afterwards died before he could be cross-examined:—

Held, that although, in the opinion of the Court, a mistake common to both parties had been made, of which *S.* sought to take an improper advantage, yet a simple decree for rectification could not be made after the lapse of

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time and against the oath of one of the parties; but that the Defendants, the representatives of *S.*, were entitled to the option of having the conveyance rectified, or the whole transaction set aside; and in the event of the Plaintiff not choosing to accept the latter alternative, the bill must be dismissed without costs.

THIS was a suit instituted for the purpose of rectifying a conveyance made on a sale.

On the 16th of September, 1865, an agreement in writing was made between *John Spittle* (therein called the vendor), of the one part, and the Plaintiff, *Caleb Bloomer* (therein called the purchaser), of the other part. This agreement contained the following clauses:—

"First: The vendor agrees to sell, and the purchaser to purchase, for the sum of £2000, the dwelling house and hereditaments at *Hill Top* aforesaid, in the respective occupations of *George Thomson*, *Richard Clewes*, and *Henry Williams*, shewn on the plan hereto. The purchaser to pay a deposit of £5 per cent. on and in part of his purchase-money on the execution of this agreement.

"Third: And it is further agreed that, notwithstanding the sale and purchase hereby agreed upon, the vendor may (without entering on the surface) work the mines under the land hereinafter agreed to be leased, without being responsible for any damage thereby occasioned to the premises, the subject of this agreement.

"Fourth: And further, that the vendor shall lease to the purchaser for the term of seven years, from the 25th day of March next, the field of land shewn on the said plan, at the yearly rent of £10; but, nevertheless, with a reservation to the vendor of all mines under the said field, with power to work the same (not entering upon the surface of the said field) without being responsible for any consequent damage, and subject to a condition that if the vendor should be desirous of selling the said demised land, or any part thereof, he shall be at liberty at any time to determine the said term upon giving to the said purchaser twelve calendar months' notice of his intention so to do. And in the said lease the vendor shall covenant with the said purchaser, that during the said term he will not sell the demised land, or any part thereof, to any person without having first offered the same for sale (at the same or a less price) to the said *Caleb Bloomer*."

At the foot of the agreement was a rough sketch of the property agreed to be sold and of the field agreed to be demised.

The sale was carried into effect, and the conveyance of the land purchased by the Plaintiff was executed by *Spittle* in April, 1866. This conveyance contained an exception and reservation to *Spittle* of all mines of coal and ironstone under the property conveyed.

Subsequently to the date of the conveyance, the Plaintiff expended considerable sums in repairs and the erection of new buildings on the property.

In July, 1870, *Spittle* advertised the minerals under the property for sale; and thereupon the Plaintiff filed the bill in this suit against *Spittle*, alleging that the exception and reservation of minerals had been inserted in the conveyance under a mutual mistake of the Plaintiff and *Spittle*, and contrary to the true agreement between them; and praying for a rectification of the conveyance by the omission of the exception and reservation, and for an injunction to restrain *Spittle* from selling or working the mines and minerals comprised therein.

Spittle put in an answer denying the mistake, and asserting that the conveyance was made in pursuance of the real agreement between the parties, and claiming the benefit of the exception and reservation.

Spittle died shortly after putting in his answer. The suit was revived against his representatives, and now came on to be heard.

It appeared that the agreement of the 16th of September, 1865, was settled at an interview between the Plaintiff, *Spittle*, and their respective solicitors. During the discussion which preceded the final settlement of the agreement the Plaintiff's solicitor made some pencil interlineations on his copy of it, and these interlineations were not erased, and still remained on the document when produced at the hearing. *Spittle's* copy was not forthcoming.

Upon the evidence the Master of the Rolls was of opinion that the partner of the Plaintiff's solicitor, who prepared the draft conveyance, was misled by the pencil interlineations into supposing that the Plaintiff's purchase did not include the mines

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and minerals, and that he accordingly introduced the exception and reservation complained of into the draft; that the agreement as set out above truly represented the agreement come to between the parties; that the introduction of the exception and reservation into the conveyance was a common mistake; and that some time after the execution of the conveyance *Spittle* discovered the mistake, and resolved to take advantage of it.

Mr. *Southgate*, Q.C., and Mr. *Ince*, for the Plaintiff, submitted that the evidence shewed that there had been a mistake common to both parties, and this being so, that the Plaintiff was entitled to the relief he sought: *Mortimer* v. *Shortall* (1); *Garrard* v. *Frankel* (2); *Harris* v. *Pepperell* (3); *Murray* v. *Parker* (4); *Davies* v. *Fitton* (5).

Mr. *Fry*, Q.C., and Mr. *Begg*, for the Defendants, contended that it was not conclusively shewn that there was a common mistake, or that the mistake had occurred in reducing the contract to writing, or in expanding the contract into the deed, as ought to be shewn: *Mortimer* v. *Shortall*; *Fowler* v. *Fowler* (6); and that the cases of *Garrard* v. *Frankel* and *Harris* v. *Pepperell* shewed that, even if there had been a mistake, rectification was not the proper relief; and they cited *Humphries* v. *Horne* (7) and *Beaumont* v. *Bramley* (8).

Mr. *Southgate*, in reply, relied on *Mortimer* v. *Shortall* as being almost identical with the present case, and further cited *Rob* v. *Butterwick* (9).

Feb. 26. LORD ROMILLY, M.R., after stating the facts, continued:—

The Vendor, *Spittle*, died pending the suit, which is much to be regretted, both for the Plaintiff and the present Defendants,

(1) 2 Dr. & W. 368.
(2) 30 Beav. 445.
(3) Law Rep. 5 Eq. 1.
(4) 19 Beav. 305.
(5) 2 Dr. & W. 225.
(6) 4 De G. & J. 250.
(7) 3 Hare, 276.
(8) T. & R. 41.
(9) 2 Pri. 190.

who represent *Spittle*, and have only done their duty in defending this suit after his death. His examination would unquestionably have thrown considerable light on the subject. However, on the facts now before me, I have come to the conclusion that the excepting the minerals from the land conveyed to the Plaintiff in fee was a common mistake; but the mistake was fallen into, and the error committed by the solicitor of the Plaintiff, in April, 1866. No complaint is made, in consequence, it is alleged, of ignorance of the fact, until upwards of four years afterwards, in 1870, when there was an advertisement for sale of the minerals. Now, although I have looked through all the cases on the subject, I have not discovered any one case where, under such circumstances, the Court has adversely and compulsorily altered a deed, and forced upon a Defendant an instrument he never executed. The case that most resembles the present is that of *Mortimer* v. *Shortall* (1), which unquestionably is very like it; but it does not appear to me that that case, which goes further than any other I have seen, goes to the extent of this, or justifies me in altering the deed in this case after so great a lapse of time, and against the oath of one of the parties. It is the bounden duty of the purchaser, when he purchases land, to look at his conveyance, and see what it is that he has got.

The only other case I have noticed as being near to this one is that of *Garrard* v. *Frankel* (2), before myself. That is the case I propose to follow on the present occasion, and, without going through the whole of the evidence to explain why I arrive at the conclusion I have stated (which would be merely useless), I am of opinion that, if the Defendants choose, I must give them the option of having the deed rectified and altered as the Plaintiff seeks, or of having the whole transaction set aside; and then the Defendants will have to repay the purchase-money with interest at 4 per cent. per annum, and the Plaintiff will be fixed with an occupation rent; and there must be an inquiry to ascertain what the Plaintiff was entitled to in respect of repairs and lasting improvements.

As a general rule, the costs of repairing a man's own blunder fall upon himself, and he ought to pay for it; but I am bound to

(1) 2 Dr. & W. 363. (2) 30 Beav. 445.

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say I do not think this was an honest defence of *Spittle's;* and that being so, I shall give no costs of the proceedings on either side. If it had been simply a mistake, the Plaintiff would have had to pay all the costs of rectifying it.

Mr. *Southgate:*—Possibly the Plaintiff might not wish to have the sale set aside, and in that case perhaps your Lordship will give us the option of dismissing the bill without costs.

The MASTER OF THE ROLLS assented.

Solicitors: Messrs. *Duignan, Button, & Smiles,* agents for Messrs. *Duignan, Lewis, & Lewis, Walsall;* Mr. *T. W. Goldring,* agent for Mr. *C. B. Smith, Wolverhampton.*

M. R. 1872 *March* 3, 4, 11.

COCKAYNE *v.* HARRISON.

[1869 C. 118.]

COCKAYNE *v.* HARRISON.

[1869 C. 150.]

Will—Construction—Gift for life of Farm and Farming Stock—Articles quæ ipso usu consumuntur.

A gift for life of a business and stock in trade confers only a life interest in such part of the stock in trade as consists of consumable articles.

Secus, where the gift is of consumable articles, without any reference to trade or business.

JAMES COCKAYNE, a farmer, was, at the time of making his will and at his death, in occupation, as tenant from year to year, of two farms, one at *West Bridgford,* the other at *Sneinton,* in the county of *Nottingham.* By his will, dated the 21st of October, 1868, he gave to his wife *Jane* such furniture (to be selected from the testator's furniture at *West Bridgford*) as should be sufficient to furnish her a comfortable room at his farm at *Sneinton,* which furniture, together with his farming stock, and all other his personal estate and effects at *Sneinton* aforesaid, the testator gave and bequeathed to his wife during the term of her widowhood, and

from and after the time of her marrying again or her decease he gave the same to trustees upon trust for sale. He died on the 28th of October, 1868.

Two suits were instituted for the administration of his estate, and now came on for further consideration.

Part of the stock of the farm at *Sneinton* consisted of cattle, stacks of hay, and other consumable articles. The question was, what interest the widow of the testator, who had married again, took in these articles.

Mr. *Davey*, for the Plaintiffs in the first of the two causes, submitted that the widow took a life interest only in the consumable articles.

Mr. *Fellows*, for the widow, contended that the gift conferred an absolute interest in these articles: *Randall* v. *Russell* (1); *Andrew* v. *Andrew* (2). The Lord Chancellor had come to an opposite conclusion in *Groves* v. *Wright* (3); but his decision was founded on special circumstances which did not occur in the present case, and had not been followed in *Bryant* v. *Easterson* (4).

Mr. *Davey*, in reply, relied on *Groves* v. *Wright*. The intention of the testator was that his business of a farmer should be carried on, and the gift of stock was made as incident to the gift of the business. If a wine merchant gave his business to a legatee for life, it could never be contended that the legatee was intended to take the stock in trade absolutely.

Mr. *Fry*, Q.C., *amicus curiæ*, referred to *Phillips* v. *Beal* (5).

Sir *R. Baggallay*, Q.C., and Mr. *Miller*, Q.C., for the executors.

Mar. 11. LORD ROMILLY, M.R.:—

The question in this case is as to the effect of a gift for life of perishable articles, which cannot be used without being con-

(1) 3 Mer. 190.
(2) 1 Coll. 690.
(3) 2 K. & J. 347.
(4) 5 Jur. (N.S.) 166.
(5) 32 Beav. 25.

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sumed. It arises under these circumstances:—[His Lordship stated them].

I am disposed to think, after looking at all the cases, and particularly at that of *Groves* v. *Wright* (1), that the rule cannot be considered as quite settled; but I think that the distinction which I took in *Phillips* v. *Beal* (2) is sound, and that I ought to follow that decision. Here is a gift for life of farming stock which is made in connection with a gift for life of the business, the stock being necessary to carry on the business; and I think that under these circumstances the legatee is bound to keep up the stock, and further, that if, for any reason, it is sold off and the business discontinued, she only takes a life interest in the proceeds. Where there is no trade, I am disposed to adopt the view taken in *Randall* v. *Russell* (3), and to hold that the legatee takes an absolute interest.

Solicitors: Mr. *W. Berry;* Messrs. *Field, Roscoe, & Co.*

M. R. 1872 March 12.

WOOD *v.* WEIGHTMAN.

[1869 W. 216.]

Breach of Trust by Testator—Liability of Executors—Distribution of Assets under 22 & 23 *Vict. c.* 35, *s.* 29—*Advertisements for Claims.*

1 CPD. 253.

The executors of a testator, whose estate was liable to replace trust money in consequence of a breach of trust:—

Held, not protected from liability under 22 & 23 Vict. c. 35, s. 29, they having only issued notices for claims against the testator's estate, to be sent in within three weeks, by advertisement in local newspapers in the neighbourhood where the testator resided, and not in the *London Gazette*.

THIS was a suit to render the estate of a deceased testator liable for a breach of trust alleged to have been committed by him in allowing his solicitor to receive and retain in his hands for two years certain trust moneys when the mortgage on which they were invested was paid off, whereby the amount of £1117 was lost to the trust estate.

The executors, who were Defendants to the suit, disputed the liability of their testator's estate, and further stated that they

(1) 2 K. & J. 347 (2) 32 Beav. 25. (3) 3 Mer. 190.

received no notice of the claim till after they had distributed the estate, and that, previously to doing so, they had caused advertisements to be inserted in four of the local newspapers circulating in the neighbourhood where the testator resided with reference to the estate of the testator, requiring all persons having debts or claims upon the estate to send in particulars thereof within three weeks from the time when the advertisements had been published.

Under these circumstances they claimed to be protected by 22 & 23 Vict. c. 35, s. 29, which provides that "where an executor or administrator shall have given such or the like notices as in the opinion of the Court in which such executor or administrator is sought to be charged would have been given by the Court of Chancery in an administration suit, for creditors and others to send in to the executor or administrator their claims against the estate of the testator or intestate, such executor or administrator shall, at the expiration of the time named in the said notices for sending in such claims, be at liberty to distribute the assets of the testator or intestate, or any part thereof, amongst the parties entitled thereto, having regard to the claims of which such executor or administrator has then notice, and shall not be liable for the assets or any part thereof so distributed, to any person of whose claim such executor or administrator shall not have had notice at the time of distribution of the said assets."

It appeared that in the present case no advertisements had been inserted in the *London Gazette* or in any *London* newspaper.

Sir *R. Baggallay*, Q.C., and Mr. *Chapman Barber*, for the Plaintiffs.

Mr. *Dunning*, and Mr. *B. B. Rogers*, for Defendants in the same interest as the Plaintiffs.

Mr. *Fry*, Q.C., and Mr. *Marten*, for the executors, contended that, under the circumstances of the case, the testator's estate was not liable, and that, even if it were, the executors were protected by the advertisements they had issued, which were a sufficient compliance with sect. 29 of the Act 22 & 23 Vict. c. 35.

M. R. 1872 WOOD v. WEIGHTMAN.

LORD ROMILLY, M.R. :—

This is virtually an undefended suit, as there can be no doubt about the breach of trust committed by the testator in leaving trust money for two years in the hands of his solicitor. The question is whether the executors are personally liable. I am of opinion that they are. The 29th section of the Act is only a protection to executors who have given "such or the like notices as would have been given by the Court of Chancery in an administration suit." Now, these executors have only caused advertisements to be inserted in local newspapers, which is insufficient.

In this Court we never allow an estate to be distributed without notice being inserted in the *London Gazette*, and generally we require an advertisement to be inserted in the *Times*. When an estate is administered of a testator in the country, the notice is also inserted in some newspaper having a local circulation in the neighbourhood. Besides, the time within which claims were required to be sent in, namely, three weeks, was too short. There will be a declaration that the testator's estate is liable to make good the sum of £1117, the amount of the trust fund, and that the executors are personally liable, and must pay the costs of the suit.

Solicitors: Mr. *R. H. Nettleship*, agent for Messrs. *Mee, Burnaby, & Denman, East Retford;* Messrs. *Cree & Last*, agents for Messrs. *Hoyle & Son, Rotherham;* Messrs. *Thomas & Hollams*, agents for Messrs. *Newbald & Falkner, Newark.*

In re NANTEOS CONSOLS COMPANY.

THOMAS' CASE.

M. R.
1872
March 18.

Winding-up—Contributory—Agreement to take Shares—Power of Directors to relieve from Contract—Ultrà Vires.

The directors of a limited company, who were authorized by their articles "to enter into, alter, rescind, or abandon contracts, in such manner as they should think fit," and also, by another clause in their articles, with the previous sanction of a general meeting, to purchase the company's shares, or reduce or cancel unissued or forfeited shares, accepted an offer from *T.*, their paid secretary, to take 1000 shares in order to raise money for the purposes of the company. After *T.* had taken and paid for 850 of the shares, he resigned his secretaryship, and the directors, in consideration of his resignation, resolved to relieve him from further payments in respect of such shares as he had agreed to take. The company was subsequently wound up:—

Held, that the directors had not acted *ultrà vires* in relieving *T.* from his obligation, and that *T.* was not a contributory.

THIS was an adjourned summons for the purpose of determining whether the name of *Charles Thomas*, who was formerly secretary of the *Nanteos Consols Company, Limited*, now in liquidation, was properly placed on the list of contributories of the company in respect of 150 shares, under the following circumstances:—

In 1869 the directors, being in want of money to carry on the operations of the company, received a proposal from *Thomas* to take 1000 shares.

On the 21st of December, 1869, the directors passed the following resolution:—

"That for the purpose of raising money for the due working of the mine, as occasion arises, the offer of Mr. *Thomas* be accepted, namely, to take 1000 shares; the terms to be that Mr. *Thomas* shall take up at least fifty shares per month."

When *Thomas* had taken up 850 out of the 1000 shares, he agreed to resign the secretaryship, for which he received a salary of £105 a year; and at a meeting of the directors, held on the 1st of August, 1870, at which *Thomas* was present, it was agreed that his resignation should be accepted, and that in consideration of his resignation he should be relieved from further payments in respect of such shares as he had agreed to take.

M. R. 1872 THOMAS' CASE.

The 22nd clause of the articles of association provided as follows: "The company may, with the sanction of a special resolution of the company previously given in general meeting, decrease its capital by purchasing with its own moneys any of the shares of the company, or by reduction or cancellation of unissued or forfeited shares (if any), and the company may, with such sanction as aforesaid, postpone the issue of any of the shares of the company for such time as the company may think fit."

By the 48th clause of the articles of association the directors were empowered, among other things, "to enter into, alter, rescind, or abandon contracts in such manner as they should think fit."

In January, 1871, an order was made for winding up the company, and the question was whether *Thomas* should be made a contributory in respect of the remaining shares.

Mr. *Graham Hastings*, for Mr. *Thomas*:—

If there was any binding contract at all to take shares in the company, it was only for the purpose of supplying money to carry on the company. That purpose is now at an end by reason of the company being in liquidation, therefore the contract is also at an end: *Pellatt's Case* (1). Further, the directors relieved *Thomas* from his obligation to take shares on good consideration, namely, his resignation of the office of secretary.

The resolution of the 1st of August, 1870, was not *ultrà vires* of the directors, because it was within the terms of the 48th clause of the articles of association, empowering the directors to rescind or abandon contracts as they might think fit. On these grounds I contend that Mr. *Thomas* cannot properly be made a contributory.

Sir *R. Baggallay*, Q.C., and Mr. *Millar*, for the liquidator:—

The directors in this case have acted *ultrà vires*, as the 48th clause of the articles is not applicable to a contract to take shares in the company. It would appear from the 22nd clause that such a contract could not be rescinded without the sanction of a general meeting. In *Stanhope's Case* (2), where there was a clause in a deed of settlement authorizing directors to act in such a manner as might best promote the interests of the company, it was held that

(1) Law. Rep. 2 Ch. 527 (2) 3 De G. & Sm. 198.

the directors were not enabled to cancel the shares of a retiring director, and that, on the company being wound up ten years after such a cancellation, the retiring director was properly made a contributory. Here there was an actual binding contract, on the part of Mr. *Thomas*, to take 1000 shares, and the directors had no power to relieve him from fulfilling any part of it.

[They also referred to *Marshall* v. *Glamorgan Iron and Coal Company* (1).]

LORD ROMILLY, M.R.:—

Mr. *Thomas* is not a shareholder in respect of the 150 shares in question. He did not actually take these shares; he only agreed to take 1000 shares on the faith of his position as secretary of the company. After he had taken 850 shares his position as secretary came to an end, and the directors relieved him from his obligation to take the rest. That was not an act *ultrà vires*. I am of opinion that they had power, under the 48th clause of the articles, to relieve him from that part of his contract, and that they have done so. His name cannot be retained on the list of contributories.

Solicitor for Mr. *Thomas*: Mr. *G. Freeborn*.
Solicitors for the Liquidator: Messrs. *Jones & Blaxland*.

(1) Law Rep. 7 Eq. 129.

V.-C. M.

1872

Jan. 18, 19.

ROBINS *v.* GOLDINGHAM.

[1870 R. 175.]

Solicitor's Lien—Discharge by Solicitor—Demand for Funds to carry on Suit.

7 Ch D. 310

Where a solicitor applied to his client for funds to carry on a suit, and, upon the client not furnishing any, declined to continue to conduct the litigation, and the client appointed fresh solicitors:—

Held, that this was a discharge by the solicitor, and that he might be called upon to deliver to the new solicitors the papers relating to the matters in question in the suit, on their undertaking to hold them without prejudice to his lien and to return them undefaced within twelve days after the conclusion of the suit, and to allow the former solicitor access to them for the purpose of carrying on an action for his costs.

THIS was a motion calling upon *John Suckling*, who acted as the Plaintiff's solicitor at the commencement of the suit, to hand over to their present solicitors the papers in his possession relating to the matters in question in the suit, on their undertaking to hold them without prejudice to his lien and to return them undefaced within twelve days after the conclusion of the suit.

The bill was filed by Mr. *Robins*, who was the trustee of the marriage settlement of a Mr. and Mrs. *Dance*, and by Mrs. *Dance*, to obtain an injunction to restrain the seizure, under a distress, of farming stock and other effects forming part of the settlement funds. After the answers had been put in and evidence gone into, the cause was, with the permission of the Court, referred to the County Court Judge of *Worcester* for his decision.

Mr. *Suckling* continued to be the solicitor of the Plaintiffs till the order of reference was obtained. The property in question was not large, and a considerable amount of costs had been incurred, towards which Mr. and Mrs. *Dance* had paid £100. Mr. *Suckling* then applied for money to pay counsel's fees, and Mr. *Dance* declined to furnish any more, and a correspondence ensued in which Mr. *Suckling* refused to go on with the suit unless supplied with further funds, and on the 20th of July he wrote to Mr. *Dance* a letter, in which, after mentioning certain counsel's fees which were then unpaid, he said: "It is out of all reason to expect any soli-

citors to pay counsel's fees, more particularly in a case like this, and, moreover, it is quite contrary to the practice of the profession;" and, after alluding to other circumstances, continued: "Under the present unsatisfactory circumstances, I beg to say that I really must decline to increase my liabilities on your account unless some satisfactory arrangements be made as to costs."

An order was then obtained by the Plaintiffs to change their solicitor, but Mr. *Suckling*, on being applied to, declined to hand over the papers relating to the suit, unless he had his costs paid or secured. He alleged, amongst other things, that he required the papers to enable him to carry on an action which he had commenced against Mr. *Robins*, who was also the next friend of Mrs. *Dance*, for his costs. It was impossible to continue the suit unless the papers, and in particular the order of reference, were handed over to the new solicitors, and accordingly the present motion was made. Mr. *Robins*' defence to the action was that he had only accepted the office of next friend on a written undertaking by Mr. *Suckling* not to look to him personally for payment of the costs.

Mr. *Glasse*, Q.C. (Mr. *Locock Webb* with him), in support of the motion:—

This is in effect a discharge by the solicitor, and he has no lien on the papers for his costs. The order asked for is the same as was made in *Heslop* v. *Metcalfe* (1). The rule is invariable where the discharge is by the solicitor: *Griffiths* v. *Griffiths* (2).

Mr. *Glasse* was then stopped by the Court.

Mr. *Cotton*, Q.C., and Mr. *Everitt*, for Mr. *Suckling*:—

This is not a discharge by the solicitor. Mr. *Suckling* was quite willing to go on if supplied with funds. It is for the parties moving to shew their right to have the papers handed over, and when applying for the order to change their solicitor they ought also to have asked for one to hand the papers over to them. An express discharge by the solicitor must be shewn: *Lord* v. *Wormleighton* (3). The parties ought, at all events, to be put upon an express admission of their liability for the costs.

(1) 3 My. & Cr. 183. (2) 2 Hare, 587. (3) Jac. 580.

V.-C. M. 1872 ROBINS v. GOLDINGHAM.

SIR R. MALINS, V.C.:—

This is a suit by a Mr. *Robins*, who is a trustee for Mrs. *Dance*, and he appears as Plaintiff in that capacity, and is also Mrs. *Dance's* next friend. Mr. *Robins* is consequently *primâ facie* liable for all the costs incurred by Mr. *Suckling*, the solicitor who has conducted the suit up to this time and concurred in the reference to the County Court Judge of *Worcester*. There was some difference between the parties, and Mr. *Suckling* applied for funds to pay counsel's fees. Mrs. *Dance* had no funds, and on the 20th of July Mr. *Suckling* writes as follows:—[His Honour then read the passages from the letter above set out, and continued:—] It is as plain as anything can be that Mr. *Suckling* thereby declined to go on with the suit. It is a clear case of a solicitor discharged by himself.

Now it is well settled that where a solicitor is discharged by the client he has a lien for his costs upon the papers in his hands, and can retain them till he is satisfied; but it is different where the discharge is by the solicitor. There is no blame to be imputed to Mr. *Suckling* for declining to go on with the suit; but it is clear that a solicitor is not entitled to stop litigation, because he cannot obtain funds to enable him to carry it on. There is no injustice in this view, because when the papers are in the hands of the new solicitor, Mr. *Suckling* will retain any lien to which he is entitled.

It is said that this is an exceptional case, and that the terms of the order should fix the parties with an admission of liability. But if *Robins* is right in saying that he has the undertaking of *Suckling* not to look to him for the payment of his costs, there would be no justice in forcing him to make any admission of liability. Being, therefore, of opinion that the case is clear, and that I have only to apply the rules laid down by Lord *Eldon* in *Colegrave* v. *Manley* (1), which was followed in *Heslop* v. *Metcalfe* (2), and on which I acted in *In re Faithful* (3), the order must be to deliver up the papers to Messrs. *Wilkins, Blyth, & Marsland*, on their undertaking to receive and hold them without

(1) 1 T. & R. 400. (2) 3 My. & Cr. 183.
(3) Law Rep. 6 Eq. 325.

prejudice to any right of lien, and to return them undefaced, and also to allow *Suckling* access to them for the purpose of his action.

I am, therefore, clearly of opinion that *Suckling* has been wrong throughout, and must pay the costs.

V.-C. M. 1872 ROBINS v. GOLDINGHAM.

Solicitors: Messrs. *Wilkins, Blyth, & Marsland;* Messrs. *Miller & Miller.*

RUBERY *v.* GRANT.

V. C. M. 1872 Jan. 24.

[1871 R. 139.]

Exceptions—Scandalous Matter not pertinent to the Relief.

The bill alleged that under a certain contract the Plaintiff was entitled to shares in a company which had been placed under the control of the Defendant, who was to dispose of them as he should from his experience in such matters think fit. It then alleged that the Defendant was in fact in league with other persons, whom he called a syndicate, in order to deal with the shares and contrive operations on the *Stock Exchange* (popularly called rigging the market) for the purpose of bringing the shares up to a fictitious value in the market. The bill prayed a decree for specific performance of the contract, and that the Defendant might be restrained by injunction until the Plaintiff's claim should be satisfied, from parting with the shares in his possession:—

Held, upon an exception for scandal, that the allegation of improperly dealing with the shares was scandalous matter, and not pertinent to the relief sought, and must be expunged from the bill.

THE bill stated that the Defendant *Ashbury Harpending* arranged with the Plaintiff that *Harpending* and the Plaintiff should negotiate the sale to a company, to be formed for that purpose, of a valuable mining property in the State of *Nevada;* that for this purpose they entered into negotiations with the Defendant *Albert Grant*, which resulted in an agreement, dated in March, 1871, under which the Defendant *Albert Grant* was to promote and bring out a company, to be called "*The Mineral Hill Silver Mines Company;*" that *A. Grant* was so to dispose of the shares of the company, and arrange with the directors, that so many only of the shares should be disposed of as should be absolutely necessary to raise the moneys (about £200,000) required for the purchase of the mining property, and the money necessary for the expenses and

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promotion fees; and that of the remaining shares, 60,000 should belong to the Defendant *Ashbury Harpending*, and the rest to the Defendant *Albert Grant*, but that all the shares of *Albert Grant* and *Ashbury Harpending* should be dealt with as thereinafter mentioned; that *Ashbury Harpending* should cause the mining property to be assured to the company at the price of about £200,000, and that the capital of the company should be upwards of £300,000; that the said remaining shares so belonging to *Albert Grant* and *Ashbury Harpending* should remain under the control of *Albert Grant*, who should dispose of them as he should from his experience in such matters think fit, and that the first £20,000 nominal value of the said shares which should be realised, and the proceeds thereof, should be attributable to the shares of *Albert Grant;* and that thereafter all the said shares which should be realised, and the proceeds thereof, should be attributable to the shares of *Albert Grant* and *Ashbury Harpending* in the proportions in which they were entitled to the same.

On the day after this agreement was signed *Ashbury Harpending* wrote a letter to the Plaintiff, agreeing that, in consideration of his services in connection with the mining company, he would give the Plaintiff £5000 worth of shares in the mining company or property, and the premium which might be derived from £10,000 worth of his shares in addition to the £5000. On the same day the Defendant *Ashbury Harpending* wrote to *Albert Grant* informing him of the agreement with the Plaintiff, and requesting that in case of any accident happening to him the same should be paid to the Plaintiff *pro ratâ*, as payment to him, *Ashbury Harpending*, or his estate.

The bill then stated that large sums of money had been received by *Albert Grant* in respect of the profits accrued from the *Mineral Hill* property and moneys, which he now claimed to retain; and that he refused to perform the agreement of the 14th of March, 1871, or to recognise the Plaintiff's interest thereunder; that the whole of the shares in the *Mineral Hill Silver Mines Company* (with the exception of a few used for the qualification of the directors), and which therefore amounted to nearly £300,000 in nominal value, were now in the control of *Albert Grant* or persons who had arranged with him for the same; that *Albert Grant* was in fact in

league with several persons whom he called a syndicate, in order to deal with the said shares and contrive operations on the *Stock Exchange* (popularly called "rigging the market"), for the purpose of bringing the shares up to a fictitious value in the market; that *Albert Grant* still refused to recognise the Plaintiff's interest in the shares and moneys, and threatened, unless restrained by the injunction of the Court, to dispose of and appropriate the whole of the sum of about £30,000 received in respect of profits as aforesaid, and to pay over and appropriate, without noticing the Plaintiff's claim, all the shares and proceeds of shares received by him and now in his control, and subject to the agreement of March, 1871.

The bill prayed specific performance of the agreement of the 14th of March, 1871; that the Plaintiff might be declared entitled to such portions of the proceeds and profits of the shares belonging to *Ashbury Harpending* as were assured to him by the letter and agreement of the 15th of March, 1871; that the Defendant *Albert Grant* might be restrained by injunction until the Plaintiff's claim should be satisfied from parting with or transferring shares in the company, so as to leave less than £5000 worth of such shares available to satisfy the Plaintiff's claim; and that the company might be restrained from permitting such transfer; and that, if necessary, a receiver might be appointed of any shares in the company belonging to or under the control of the Defendant *Albert Grant*.

The cause now came on upon an exception taken by the Defendant *Albert Grant*, that the following passage in the bill, namely: "That the said *Albert Grant* is, in fact, in league with several persons, whom he calls a syndicate, in order to deal with the said shares and contrive operations on the *Stock Exchange* (popularly called 'rigging the market') for the purpose of bringing the shares up to a fictitious value in the market," was scandalous, and the Defendant insisted that such scandalous matter ought to be expunged therefrom.

Mr. *Glasse*, Q.C., and Mr. *Higgins*, in support of the exception:—

The object of this bill is to obtain specific performance of an agreement, and the injunction sought for is to restrain the Defen-

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dant from parting with the shares under his control until the Plaintiff's claim is satisfied. There is no relief prayed as to the manner in which Mr. *Grant* has dealt with the shares; and there is no prayer to restrain him from dealing with them in any particular manner; consequently the allegation that he is forming a syndicate, in order to contrive operations on the *Stock Exchange*, popularly called "rigging the market," and thereby bring the shares up to a fictitious value, is totally irrelevant to the issue between the parties. The issue is simply the construction of an agreement between *Grant* and *Harpending*, and whether the Plaintiff is entitled to certain advantages from an alleged sub-contract between him and *Harpending*, having no reference whatever to an improper dealing with the shares. The injunction to restrain the parting with the shares until a construction is put upon the contract is a mere matter of course, and was at once submitted to by Mr. *Grant*, but the charge of fraudulently dealing with the shares is scandalous. Such a charge, though scandalous, might possibly be justifiable if it were relevant to the issue; but not being relavant it is an improper statement and ought to be expunged from the bill.

[They cited *Robson* v. *Lord Brougham* (1).]

Mr. *Cotton*, Q.C., and Mr. *W. P. Beale*, for the Plaintiff:—

The issue raised by the bill is the Plaintiff's right under the contract; but there is also the prayer for an injunction to restrain the Defendant from parting with or transferring the shares. The allegation of an improper dealing with the shares was relevant to that portion of the prayer when the bill was filed; and though the injunction has since been submitted to, there is no ground for its being now expunged from the bill. The statements in the bill shew that these shares which the Plaintiff claims to be entitled to are under the control of Mr. *Grant*. This assumes that he will deal with them and dispose of them in a proper manner. If, on the contrary, he has been forming a syndicate, and so dealing with the shares as to raise them to a temporary fictitious value, the property is likely to be damaged, and it is material, therefore, to that portion of the bill to shew that there has been an improper dealing

(1) 19 L. J. (Ch.) 465.

with the shares on his part. If the statement is relevant to one portion of the relief which is asked, namely, the injunction, it is not the less relevant because the bill does not go further and pray that the Defendant may be restrained from so improperly dealing with the shares. The bill alleges that the Defendant has entered into a contract to part with or transfer the said shares for an improper purpose, and the "said shares" include the 5000 shares alleged by the Plaintiff to belong to him. The statement is, that he intended to part with the shares improperly, and the injunction sought for is to restrain him from so parting with the shares. The allegation is therefore relevant, and ought not to be expunged.

SIR R. MALINS, V.C.:—

This is an exception for scandal contained in a particular paragraph of the bill, which states that Mr. *Albert Grant* is in fact leagued with certain persons, whom he calls a syndicate, in order to deal with the said shares, and contrive operations on the *Stock Exchange* (popularly called "rigging the market") for the purpose of bringing the said shares up to a fictitious value in the market. The rules of this Court with regard to scandal, I think, have been correctly stated on both sides, and admit of no doubt. Charges of the most offensive character may be introduced into a bill or into an answer—into the pleadings, as we call it in this Court—if they are relevant to the issue or the matter in question between the parties; but it is not allowable to introduce offensive statements unless they are relevant to the relief sought. It is then scandal; in other words, it is never scandal when it is pertinent. But if the matter is introduced offensively, making charges of immorality and misconduct having no relation whatever to the issue between the parties, then, as it is scandal in itself, so it is scandal in the eyes of this Court.

What I have to determine here is, whether this passage, which is admitted to be scandal in itself, comes within that doctrine? It is scandalous, since it makes against the Defendant *Albert Grant* a charge of dishonesty, because "rigging the market"—that is, going into the market pretending to buy shares by a person whom you put forward to buy them, who is not really buying them, but only pretending to buy them, in order that they may be quoted

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in the public papers as bearing a premium, which premium is never paid—is one of the most dishonest practices to which men can possibly resort. There is a class of people who think it is a legitimate mode of making money; but if they would only examine it for a moment they would see that a more abominable fraud, and one more difficult of detection, cannot be found. The statement is that Mr. *Grant* is forming a syndicate—I know what it means from having had so many of these cases before me; it is a body of men of which one is to buy and another to sell, so as to give an appearance of great demand for certain shares when in reality there is no demand for them at all, thus defrauding the public. The allegation, therefore, that Mr. *Grant* is forming a syndicate is a charge against him of an intention to promote a fraud. That cannot be permitted unless it is relevant to the issue between the parties.

Then is it so relevant? In order to determine that, we must see what is the nature of the suit. The Plaintiff, Mr. *Rubery*, states by this bill that a company was formed, and some of the allegations go to shew that the proceedings in the formation of that company are not of a character to be entirely approved of if true. They may or may not be true; but, at all events, the result of the transaction is, that one *Ashbury Harpending*, by an arrangement between him and Mr. *Grant* (*Grant* being entitled to raise money out of the £200,000), is to be entitled to £60,000 of that capital; and he being entitled to £60,000, *Rubery* has a derivative title from *Harpending*, with the knowledge of *Grant*, as he says, to £5000, part of the £60,000. The bill is filed for the purpose of obtaining an injunction. The injunction was immediately submitted to by Mr. *Grant*, who was thereby prevented from parting with those shares—or, at least, obliged to retain 5000 to represent the interest of the Plaintiff.

Now, there is no doubt that the Plaintiff would be entitled to say, "I am the owner of the shares—£5000, part of the £60,000—the rest are under your control, and they are to remain under your control, to dispose of them as you shall, by your experience in such matters, think fit." I think it is perfectly right that a man who is interested in the shares of a company, as this Plaintiff is, shall be entitled to say to a person like Mr. *Grant*, having the

control of those shares: "You are to deal with them as you in your judgment shall think fit; but that means that you are to deal with them in an honest and proper manner as you in your experience shall think fit." Therefore this charge that he is about to deal with them in a dishonest and improper manner would not, in my opinion, have been impertinent, and therefore would not have been scandalous, if any relief had been sought in respect of the charge so made; and if the framer of the bill had founded on that statement, that the market was being thus "rigged" by Mr. *Grant*, a prayer for an injunction to prevent his continuing this practice, I am by no means satisfied he would not have been entitled to maintain it; for he might say: "Although the effect of this may possibly be to increase the value of my shares, it is dishonestly increasing that value; and wealth or money obtained dishonestly I desire not to possess; and I am entitled in matters in which I am interested to prevent that course of dealing." However, no prayer whatever is founded upon that, and the only issue between the parties is, that the Defendant Mr. *Grant* and the mining company may be restrained by injunction, until the Plaintiff's claim is satisfied, from transferring or parting with the shares in the *Mineral Hill Silver Mines Company, Limited*, so as to leave less than £5000 worth of such shares to satisfy the Plaintiff's claim, and that the Defendants, the company, may be restrained from permitting such transfer. It does strike me that *Grant* might be restrained on the ground I have stated, namely, that this mode of dealing is calculated to injure *Rubery*, either because he does not desire to have a fictitious value put upon his shares, and repudiates the idea of getting an increased value by such means; or on another ground also—that such mode of dealing is calculated to raise the price for a time, and then cause a depression in consequence of the public becoming disgusted with the whole proceedings of such a company; and therefore that it is calculated to be injurious to the Plaintiff.

On both these grounds I am very much inclined to think that he would have been entitled to relief on the allegations he has made if he had sought such relief; but he has not sought that relief; and these charges of what I call dishonesty are not pertinent to any relief sought by the bill. I am consequently obliged

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to come to the conclusion that this statement is scandalous, and must be expunged.

The exception will therefore be allowed.

Solicitors for the Plaintiff: Messrs. *Lewis, Munns, & Longden.*
Solicitors for the Defendant: Messrs. *West & King.*

V.-C. M. 1872 Jan. 25.

BURGESS *v.* EVE.

[1870 B. 306.]

General Guarantee under Seal—Withdrawal of Guarantee.

A father, being desirous of obtaining advances for his son from a bank, gave the son a promissory note for £2000, and gave the bank an agreement under seal to this effect, that, in consideration of the bank discounting the note for £2000 for his son, certain deeds and documents which the father deposited with the bank should remain with the bank as security for the payment of all money due or to become due from the son to the bank on any account whatsoever; and that he would pay the bank upon demand all such money, and he thereby charged the property comprised in such documents with the repayment thereof:—

Held, that this agreement was not limited to the £2000, but was a continuing guarantee for all money already due, or which should become due from the son to the bank.

Semble, that a general guarantee under seal may, under certain circumstances, be withdrawn upon the terms of paying all that may be due under it at the time of giving notice of withdrawal.

THIS was an adjourned summons upon a claim by the *London and County Banking Company* against the estate of *Edwin Maeers*, deceased.

Edwin Maeers and his son *W. H. Maeers* were builders, and each of them kept an account at the *Shoreditch* branch of the *London and County Bank.*

In March, 1870, *W. H. Maeers*, who at that time had overdrawn his account at the bank to the amount of about £3000, required further advances, which the bank agreed to make upon having a deposit of deeds relating to certain property belonging to the father, and upon having a promissory note drawn by the father, together with his guarantee. Accordingly, a promissory note for

£2000 was signed by the father, who also gave to the bank the following guarantee, under seal, which was on a printed form used by the bank:

"To *W. McKewan*, and *W. J. Norfolk*, Esqs., public officers of the *London and County Banking Company*.

"Gentlemen,—In consideration of your discounting for Mr. *William Henry Maeers* my promissory note to him for £2000 dated this day, and payable four months after date, and of the sum of 5*s*., the receipt of which I hereby acknowledge, I deposit with you the several documents mentioned in the schedule hereunder written, which I agree shall remain with you, or other the public officers for the time being of the said company, as a security for the payment to you, or other such public officers as aforesaid, of all money due or to become due from him to the said company, of whatsoever members or proprietors it shall from to time consist, on any account whatsoever, including charges for interest, commission, and all costs, charges, and expenses which you may incur in enforcing or obtaining payment of such money, or in realising this or any further security. And I agree to pay you, or such public officers aforesaid, upon demand, all such money. And I hereby charge the hereditaments and premises comprised in such documents respectively, and all fixtures now or hereafter thereon, with the payment thereof."

There was evidence to shew that the guarantee was read over to the father, and that he distinctly understood the nature of it, and believed it to be a guarantee of the general debts of his son; and, further, that he had frequently inquired of the bank and of his son how much he was liable for. The son, who had now become bankrupt, had made an affidavit stating that his father had signed the document in question to induce the bank to advance him money for the purposes of his business, and that the money had been advanced on the faith of the guarantee.

The Chief Clerk, upon the question coming before him on the 17th of April, 1871, disallowed the claim of the bank so far as it rested upon the guarantee, principally on the ground that the guarantee, being under seal, was irrevocable, and the guarantor could never have intended to enter into an obligation which was

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beyond his power of subsequent control, and was indefinite, and consequently most burdensome both as to time and amount. He therefore limited the claim to the amount of the promissory note. Upon the question coming before the Vice-Chancellor in Chambers, it was adjourned into Court for argument.

Mr. *Glasse*, Q.C., and Mr. *Wellington Cooper*, in support of the claim:—

It is difficult to see how there can be a doubt about the words of this guarantee. It was a continuing and unlimited guarantee, without any reservation as to time or amount. The terms here used are in all respects covered by *Hitchcock* v. *Humfrey* (1), *Wood* v. *Priestner* (2), and *Calvert* v. *Gordon* (3). It is stated in *Smith's* Mercantile Law (4) that disputes often arise upon this subject, and the best rule is that laid down by Lord *Ellenborough* in *Merle* v. *Wells* (5), that if a party means to confine his liability to a single dealing he should take care to say so. In that case the guarantee was for any debts not exceeding £100, which *A. B.* might from time to time contract in the way of his business; and that was held to be a continuing guarantee. The same decision was arrived at upon very similar words in *Mayer* v. *Isaac* (6) and *Bastow* v. *Bennett* (7).

The rule is, that an instrument of this nature should be construed strongly against the party giving the guarantee. This is laid down in *Masse* v. *Pritchard* (8), and there is nothing in this case to take it out of that rule, where the evidence shews that it was not the intention of the parties to limit the guarantee. The party claiming is, therefore, entitled to prove against the estate for the full amount of the debt.

Mr. *Cotton*, Q.C., and Mr. *Nalder*, on behalf of the testator's estate:—

The instrument constituting the guarantee in this case is by no means clear and distinct in favour of the claimant's view. There must be some limit to the amount, and the natural construction

(1) 5 Man. & G. 559.
(2) Law Rep. 2 Ex. 66, 282.
(3) 3 Man. & Ry. 124.
(4) Page 464, 8th. Ed.
(5) 2 Camp. 213.
(6) 6 M. & W. 605.
(7) 3 Camp. 220.
(8) 12 East, 227.

would be, that the guarantee should extend to all sums of money due to the amount of £2000. At the time the guarantee was given there was as much as £3000 due on the running account at the bank, and if it had been the intention of the father to guarantee the whole amount, that fact would have been stated. It is evident, therefore, that the guarantee must be limited to the amount of £2000. It is laid down in *Addison* on Contracts (1) that the Courts, in the case of a surety where the deed is under seal, will lean in favour of a construction limiting the liability of the surety to some particular supply in advance, so as to confine it within an ascertained definite limit, rather than extending it to a general and continuous supply, creating an indefinite liability, from which the surety may have no means of relieving himself during the whole life of the principal. On the other hand, this is not so in the case of simple contracts not under seal. This distinction arises because a continuing suretyship under seal is not revocable—*Hassell* v. *Long* (2)—and the liability may be so onerous that the Courts are unwilling to throw a liability of such a nature upon the surety, except upon the clearest evidence of intention. Examined by this test, the present appears a case where the leaning should be, as far as possible, in favour of the testator, the surety, since the contract, as contended for by the claimant, not only makes the surety liable for an indefinite time, but also for an indefinite sum, and in which latter respect this case is an instance of a more onerous responsibility than any of the reported cases. It may be fairly inferred that the testator did not intend to enter into an obligation which was beyond his power to subsequently control, and which was indefinite, and, therefore, most burthensome both as to time and amount. It was not even in his power to give notice to terminate the guarantee. This was decided in *Calvert* v. *Gordon* (3). A guarantee under seal is the same as a bond, the liability under which cannot be terminated at the option of the obligor; and there must be the same rule of construction in this Court as at law.

Mr. *Glasse*, in reply, referred to *Shepherd* v. *Beecher* (4),

(1) Page 564, 6th Ed.
(2) 2 M. & S. 363.
(3) 3 Man. & R. 124; Danson & Lloyd, 173.
(4) 2 P. Wms. 287.

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Smith's Mercantile Law (1), and *Starkie* on Evidence (2), and the cases there cited, to shew that there was no ground for saying that a guarantee could not, under some circumstances, be revoked, even by parol. He submitted that a man might come to this Court for relief, even in the case of a guarantee under seal, and even assuming that it would not be so at law. In this case there were sufficient circumstances to entitle the claimant to relief in equity.

SIR R. MALINS, V.C.:—

This summons raises a question of very considerable importance upon bankers' guarantees. What I have to decide is, whether under a guarantee dated the 21st of March, 1870, signed by *Edwin Maeers*, the testator in the cause in which this summons is taken out, he became liable to pay only a particular debt of his son *William Henry Maeers*, or whether he became liable to pay whatever the son owed, or should afterwards owe, to the *London and County Bank*, to whom the guarantee was given.

In order to determine that question, the Court, in this as in other matters, will put itself as well as it can in the position of the parties at the time of the transaction, and from the surrounding circumstances, as well as the words of the instrument, ascertain what was the real intention of the parties to it. Looking at the surrounding circumstances I have this—the father and the son had each of them an open banking account with the *Shoreditch* Branch of the *London and County Bank*, with which this transaction was carried on. The son was in business. He wanted money, and the father, in order to enable him to obtain money, gave his son his promissory note for £2000, payable to the son's order. The son thereupon indorsed that note. The note itself was useless unless he could get money upon it. It was therefore a great object to the son, as well as to the father, desiring to support his son, that that note should be discounted. Under these circumstances he says to the bank, "Will you discount that note?" They say, "Yes, we will, upon receiving a guarantee from you." That being the transaction, the father signs this guarantee

(1) Page 477. (2) Page 510, 3rd Ed.

which is addressed to the public officers of the *London and County Bank*. [The guarantee is already set out in the statement.]

If the intention had been simply to guarantee the payment of the £2000, it would not have been necessary for *E. Maeers* to agree to pay the money, because it was his own promissory note, and, therefore, his personal liability was already committed by the note itself. It would have been enough to say: I lodge with you these deeds and other documents as security for the payment of £2000, as well as charges for interest, commission, and so on, if it is not paid; and it is in consideration of your discounting my note for £2000 and 5*s*. The object was, in my opinion, to give a general guarantee. The bank might very well have said, We are ready to discount your note, but your son has overdrawn already, and he is very likely to overdraw hereafter: will you be answerable for that? The father, desiring to renew the debt of his son, which might probably be the means of making his position in life, says to the bank, "Not only will I be liable for £2000, the amount of the note you have discounted, but I will guarantee that you shall be paid all that is now owing to you, or that my son shall hereafter owe to you." It seems not unreasonable to suppose that that was the intention of the parties.

It is sworn to, and not attempted to be contradicted (although it is very true that the father is dead, and, therefore, cannot be examined as a witness, and this is a claim brought in the administration of his estate), that the deed was read over to the father; that he distinctly understood it was a guarantee of the general debts of his son; that he frequently inquired what he owed; that he knew he was liable upon it and so treated it. Therefore, when I look at the surrounding circumstances, I should say that the intention probably was such as is expressed on the face of the instrument.

When I look at the conduct of the parties, that is confirmed. If I look at the conduct of the father, whose estate is being administered, I find that he, on more than one occasion, stated that that was his understanding, and desired to know what he had to pay.

I have been referred to the affidavit of the son as evidence worthy of credit. The son is stated to be perfectly indifferent

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upon this subject. Of course at one time he might have been very much interested in throwing the liability to pay this debt upon his father, but he has become bankrupt, and is, therefore, perfectly indifferent in the matter. He says: The testator, *Edwin Maeers*, was my father, and signed the guarantee to induce the *London and County Banking Company* to advance me money for the purposes of my business. They did so advance me money on the faith, as they told me, of my said father's guarantee, and my father well knew the nature and effect of the before-mentioned deed or document. He frequently inquired of me how much I owed the said banking company, as he wished to know the extent of his own liability to them. The same thing is stated by Mr. *Norfolk*, the public officer of the *London and County Bank*, to whom the guarantee was given.

Therefore, whether I look at the position of the parties before the transaction, their conduct during the transaction, or the conduct of the father afterwards, I equally come to the conclusion that it was the intention of the father to guarantee not only the £2000 in question on the note, but also the general debt owing, and to become owing by the son to the bank. Mr. *Maeers*, the father, was a man of business advanced in life, and we may therefore give him credit for understanding what he signed; and can anything be more explicit than the language which is adopted? "I deposit with you the several documents mentioned in the schedule hereunder written, which I agree shall remain with you, or other the public officers for the time being of the said company, as a security for the payment to you, or other such public officers as aforesaid, of all money due or to become due from him." What is the extent and limit of that? There is no limit to the amount, neither is there any limit as to time. The reasonable construction is, whatever my son may become indebted to you during any period of his life I guarantee the payment of. Notwithstanding all I have heard in argument, I think reason must be applied to the construction of such an instrument as this, although it is under seal. What I understand it to mean is, that the father will pay such sums as shall become due to the bank while the son remains a man worthy of credit. They are not to give credit to him in a reckless and unwarrantable manner after he has become

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bankrupt or insolvent. It is to receive a reasonable construction. While he remains an apparently solvent man, I guarantee any debt that he may owe to you during any part of his life until it is altered by the revocation of the guarantee. That is the construction which I put upon the instrument. I am, therefore, of opinion that the instrument is a guarantee by the father of whatever the son shall become indebted to the bank.

But then it is said that this ought to receive a more limited construction, because, being under seal, it was irrevocable. Authorities have been cited to shew that a guarantee under seal is irrevocable. I do not accede to that view of the law. Certain guarantees are undoubtedly irrevocable. When a guarantee is of the fidelity or good conduct of a servant or clerk, or person in a confidential position, it may be considered as a contract by the employer and employed, and the surety on his behalf. Therefore if a father guarantees the fidelity of his son, and upon the faith of that guarantee the son obtains a situation, there being no misconduct on the part of his son, reason requires that the father should not arbitrarily have the power of depriving his son, or any person whose credit he guarantees, of the appointment which he has obtained on the faith of the guarantee. If arbitrarily and without the fullest justification he desires to withdraw that which he has deliberately entered into, I am of opinion under such circumstances as those that he would have no right to withdraw. But if there is misconduct on the part of the person whose fidelity is guaranteed, for instance, if a man guarantees that a collecting clerk shall duly account for all moneys received by him, and that collecting clerk is found to have embezzled his employer's money, reason requires that the man who entered into the guarantee because he believed the person to be of good character, when he finds he is not so, and not to be trusted, should have the power of saying, "I now withdraw the guarantee I gave you; I give you full notice not to trust him any more." Notwithstanding all that has been said, I am clearly of opinion that a person who has entered into such a guarantee, and who is therefore responsible for the person whose fidelity is guaranteed, has a right to withdraw from that guarantee when that person has been proved guilty of dishonesty.

7 Q.B.681.

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Is there anything to be found against that? I have been referred to the case of *Shepherd* v. *Beecher* (1), which was before Lord *King* in 1725. What was that case? The son of the Plaintiff was apprenticed to a merchant at *Bristol*. It was well known that the son in the course of his apprenticeship would receive his master's moneys. The father guaranteed the son's fidelity. But the son was guilty of an embezzlement. What was the position of the father? The father was put in a very distressing situation by the conduct of his son. He had either a decided or undecided course to take. The decided course would have been to have said, "I withdraw the guarantee, and require the bond to be given up; my son has proved unworthy; he ought not to be trusted by you, nor shall he be trusted by me; give up my bond, for I warn you that I will not be answerable for him in future." Instead of taking that decided course, the father said that he, the master, ought not for the future to trust the apprentice with any cash, or, at least, that he should do it sparingly. Therefore the father, being willing to give his son a second trial, in effect says: "As he has been guilty of misconduct, sparingly trust him in future; I do not say do not trust him at all." Lord *King* says: "The father having given this bond for his son's fidelity, though there was an embezzlement, and though the father sent this letter to the master desiring him not to trust the son with receiving cash any longer, yet the father continued bound, and ought not to have satisfied himself with sending the letter, and taking no further care of the matter, but should have endeavoured to have made some end with the master, to have given up the bond; wherefore he must continue liable to answer subsequent embezzlements unless there should appear fraud in the master." My opinion is—and I have no hesitation in expressing it—that a person who gives a guarantee would have a right to say to the person taking it, "You will continue at your own peril to employ the person on whose behalf I gave the guarantee;" provided that the clerk or other person has been guilty of embezzlement or gross misconduct, or has turned out to be unworthy of the confidence reposed in him by the person giving the guarantee for him. If the employer under such circumstances refused to give the

(1) 2 P. Wms. 287.

guarantee up, the person giving it would have a right to file a bill in this Court, and in my opinion would succeed in the contest, because the Court would direct the bond to be delivered up to be cancelled. And I think that is only what good sense, propriety, and fair dealing between man and man would dictate. I think that was the principle which was sanctioned by Lord *King*, who, notwithstanding the fact that the father had already paid £203, treated it as a continuing guarantee, and ordered the father, on account of his not taking the decided course to which I have referred, to pay the whole £1000, which was the amount of his bond, allowing him to deduct the £203 already paid. I read that as a decision of Lord *King's*, that if the father had taken a proper and decided course, he would undoubtedly have been relieved altogether; instead of which the father took an undecided course.

Then a further argument has been pressed very strongly. If a man gives a guarantee that he will be answerable for money to be advanced to *A. B.*, limited to a very large amount—take it to be, for the sake of the argument, £20,000—and after the bank has advanced him £1000 only, the guarantor discovers that the person he has become security for is unworthy of credit, and of a totally different character from what was supposed when the guarantee was given, and that the money which the bank advanced to *A. B.* on the faith of the guarantee is utterly thrown away and wasted, and under those circumstances gives notice to the bank not to make any further advance; it is said because the instrument is under seal that notice is inoperative. When a man says, "I will no longer be liable for a person whom I now find dishonest," upon what principle should he be ruined because the bank have got a guarantee to the extent of £20,000? I am clearly of opinion that the principle of *Hopkinson* v. *Rolt* (1) would apply to such a case as the present. I am surprised that there should be any difference of opinion about what should have been the decision in that case; but there was a difference of opinion; for when it got to the House of Lords, although the majority were in favour of the decision, Lord *Cranworth* dissented—and he was a Judge of whose decisions I always speak with the greatest possible respect. What was that

(1) 9 H. L. C. 514.

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case? A bank got security for all money to be advanced to the customer; but the customer, upon the security of some deeds, obtained an advance from another person who gave notice to the bank, which, however, persisted in making further advances to him. The question was, whether the further advances of the bank, or the advances by the indifferent person, had priority. I am surprised that any two men could have differed upon such a subject, or doubted that the further advances should be postponed to the charges of which the bank had notice when they made the advance. It is the law that if a banker makes an advance, having notice of another person making an advance on the same security, then the subsequent advance must be postponed to the prior advance. I should think there is no doubt that a Court of Equity (whatever might be the case in Courts of Law, where they are bound to follow certain fixed rules with regard to instruments under seal) would follow that doctrine. I should be very sorry to have it supposed for a moment that where a man has given a general guarantee to a bank for a person who, by his conduct, turns out to be unworthy of confidence, he cannot withdraw that guarantee upon the terms of paying all that may be due under it at the time of giving notice of withdrawal. I have no doubt whatever that if a bill were filed under those circumstances, the guarantor offering to pay to the bank all that was due from him under the guarantee, the Court would order the guarantee to be delivered up to be cancelled.

In this case no attempt was ever made to revoke the guarantee. But if such an attempt had been made, I am clearly of opinion that the father would have been entitled to stop the guarantee for the future (of course upon the condition of paying what might have been due under it at that time) though it was under seal, just in the same way as it is admitted he would have been if it had not been under seal.

Therefore, under all these circumstances, I come to the conclusion that this was a guarantee for the money actually due from the son at the time, and for all future advances. The claim must therefore be admitted, and the amount must be ascertained.

With regard to the costs, I think, in the peculiar circumstances

of this case, the bank might very well be satisfied with adding the costs to the debt, and that is the general rule; but as this is an insolvent estate, I think that where the debt is contested the creditor, who has been unnecessarily put to expense, ought to have his costs out of the estate.

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The costs of all parties will come out of the estate.

Solicitors for the Bank: Messrs. *Purrier & Son.*
Solicitor for the Testator's Estate: Mr. *A. E. Francis.*

DEANES *v.* KITCHIN.

V.-C. M. 1872 *Feb.* 10.

[1871 D. 113.]

Practice—Notice of Motion for Decree—Substituted Service—Heir-at-Law.

In a creditor's administration suit for real and personal estate of an intestate the heir-at-law had gone out of the jurisdiction of the Court after service of the bill, but without having appeared. The real estate having been sold by the mortgagee, and an appearance having been entered for the heir-at-law:—

Held, that substituted service of the notice of motion for decree upon the administratrix for the heir was sufficient.

THIS was a creditor's suit for the administration of the real and personal estate of an intestate. The heir-at-law was made a Defendant, and was served with the bill, but did not appear, and an appearance was entered for him by the Plaintiff.

The heir-at-law then went to *America*. It appeared that the intestate's real estate had been sold by a mortgagee.

The present application was for leave to dispense with service of the notice of motion for decree upon the heir, or in the alternative for substituted service on the administratrix, who was also a Defendant.

Mr. *P. B. Abraham*, for the Plaintiff:—

The acts of the heir-at-law amount in effect to a disclaimer of the estate, and the case is not one where strict evidence is required

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for a decree as in a foreclosure suit, such as *Lechmere* v. *Clamp* (1). In a case of *Silver* v. *Frost* the Master of the Rolls allowed substituted service under similar circumstances.

SIR R. MALINS, V.C.:—

I think that, under the circumstances, substituted service upon the administratrix may be deemed good service.

Solicitor: Mr. *C. J. Gratton.*

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ATTY *v.* ETOUGH.

[1871 A. 82.]

Special Case—Practice—Marriage of Female Party—Amendment.

Where a female party to a special case has married since it was set down for hearing, the proper course is to discharge the order for the hearing and amend the case by adding the husband as a party, and to apply for leave to set it down afresh.

THIS was a special case relating exclusively to personal estate. One of the parties whose concurrence in the case was required, and who had concurred when a spinster, had married since the case was set down. There was no settlement on the marriage.

The present application was in the alternative either to discharge the order, amend the case, and set it down again, or simply to add the husband's name as a party as in the case of a suit.

Mr. *Begg*, in support of the application:—

The instances in which special cases have been ordered to be amended and set down afresh are where new parties have come into existence; as where an infant tenant in tail has been born: *Thistlethwaite* v. *Garnier* (2); which was followed by Vice-Chancellor *Bacon* in *Savage* v. *Snell* (3). Here there is no new interest

(1) 9 W. R. 355, 860. (2) 5 De G. & Sm. 73.
(3) Law Rep. 11 Eq. 264.

coming into existence, and the case is most like that of a suit where a woman who is a party marries.

SIR R. MALINS, V.C. :—

There is a new party to the case, and I think the order to set it down must be discharged, and the case amended by adding the husband as a party; and then an application must be made to set it down afresh.

Solicitor: Mr. *J. Elliott Fox.*

V.-C. B.

1872

Jan. 13.

In re AMHERST'S TRUSTS.

Tenant for Life—Forfeiture of Life Estate on Alienation—Petition for Liquidation—Bankruptcy Act, 1869, *s.* 125—*Bankruptcy Rules*, 1870.

Under a settlement in a will, it was provided that if the tenant for life of the income of a sum of stock should at any time during his life "assign over, assure, mortgage, or in any manner incumber, or by any instrument in writing, parol agreement, or otherwise howsoever, part from" the income, the life estate should be forfeited:—

Held, that the presentation by the tenant for life of a Petition for liquidation, under the arrangement clauses of the *Bankruptcy Act*, 1869, operated as a forfeiture of his life estate.

PETITION.

Elizabeth Lady Amherst, by her will, dated the 13th of March, 1827, gave and bequeathed to trustees £10,000 consols, upon trust, during the life of *Plantagenet Cary*, to pay the income to him and his assigns; and after his decease to stand possessed of the capital and income in trust for his children, or child, as he should appoint, and in default, for his children and child who should attain twenty-one, or, being a daughter, marry; if more than one, in equal shares; and if no such children, in trust for testator's nephew, *Ferdinand Byron Cary*, and his children, in manner thereinafter declared of and concerning the £10,000 like stock thereinafter mentioned.

Testatrix then directed that her trustees should stand possessed of the further sum of £10,000 consols, upon trust, during the life of *Ferdinand Byron Cary*, to pay the income to him and his assigns; and after his decease to stand possessed of the capital and income in trust for his children or child, as he should appoint, and, in default, for his children and child who should attain twenty-one, or, being a daughter, marry; if more than one, in equal shares; and if no such children, in trust for *Plantagenet Cary* and his children, in manner thereinbefore declared of and concerning the trust funds declared to be in trust for him and his children.

Testatrix then directed as follows:—

"Provided, and my will is, that in case the said *Plantagenet Cary*

and *Ferdinand Byron Cary*, or either of them, shall at any time during their respective lives assign over, assure, mortgage, or in any manner incumber, or by any instrument in writing, parol agreement, or otherwise howsoever, part from the dividends and annual produce of the said trust moneys, stocks, funds, and securities hereby declared to be in trust for them, or any part thereof, until the same are actually due, upon any pretence or in any manner whatsoever, then and in such case the right and interest of and in the dividends and annual produce of the said trust moneys, stocks, funds, and securities of such of them, the said *Plantagenet Cary* and *Ferdinand Byron Cary*, so doing, or permitting or suffering to be done, any such act or thing as aforesaid, shall cease and determine, to all intents and purposes, in such and the same manner as if the said *Plantagenet Cary* and *Ferdinand Byron Cary* respectively were actually dead, and the same shall go and be applied in such and the same manner as the same would be applicable under the aforesaid trusts, in case the said *Plantagenet Cary* and *Ferdinand Byron Cary*, respectively so incurring such forfeiture, were actually dead."

Testatrix died on the 22nd of May, 1830.

In August, 1868, the wife of *Ferdinand Byron Cary* died, leaving five children of the marriage, two of whom were now infants.

The second £10,000 stock was appointed by *Ferdinand Byron Cary* in favour of his children, and parts of the vested shares had been, under powers in the will, raised and paid by way of advancement, whereby the fund was reduced to £8937 11*s.* 8*d.* consols.

On the 17th of November, 1870, *Ferdinand Byron Cary* filed a Petition for liquidation in the *Exeter* County Court, according to the provisions of the *Bankruptcy Act*, 1869, s. 125 (1).

(1) The 252nd Rule of the Bankruptcy Rules, 1870, made in pursuance of the *Bankruptcy Act*, 1869, is as follows:—

"Proceedings under these sections (125 and 126) shall be instituted by the debtor by petition and affidavit thereto annexed, according to the forms given in the schedule." By the form of Petition (No. 106) given in the schedule, the Petitioner alleges "that he is unable to pay his debts, and is desirous of instituting proceedings for liquidation of his affairs by arrangement or composition with his creditors," and that he thereby submits to the jurisdiction of the Court. The Petition then prays that notices convening such general meeting of his creditors as may be necessary to be given by him during

V.-C. B. 1872 *In re* AMHERST'S TRUSTS.

At a general meeting of creditors, held under the provisions of the Act, on the 9th of December, 1870, it was, by special resolution, as defined by that Act, declared that the affairs of *B. C. F. P. Cary* should be liquidated by arrangement, and not in bankruptcy; and at the same meeting *Robert Alsop* was duly appointed a trustee without a committee of inspection. On the 12th of December, 1870, the above resolution, together with a statement of the assets and debts, were registered in the County Court, and the Registrar gave his certificate of that date, declaring that *Alsop* was trustee under the liquidation by arrangement.

The fund was paid into Court on an affidavit stating that the only persons who claimed to be entitled to the fund were *Robert Alsop*, four of the children, certain incumbrancers upon two of their shares, and the trustees of the marriage settlement of the fifth child, a married woman.

This Petition was presented by the two adult children and the incumbrancers on their shares, the trustees of the settlement, and the infants, praying for a distribution of the fund.

The Respondents to the Petition were the trustees and *Robert Alsop;* and the only question for decision was whether the presentation of the Petition for liquidation operated, under the clause in the will, as a forfeiture of the life interest.

Mr. *De Gex*, Q.C., and Mr. *Warmington*, for the Petitioners:—

The filing of a Petition for liquidation under the *Bankruptcy Act*, 1869, must be held to be a "parting from" the income within the meaning of the clause. Hence the condition has been fulfilled, the life estate has been forfeited, and the fund goes over to the Petitioners.

The distinction in these cases between insolvency, where the benefit of the Act is taken by the insolvent himself, and bankruptcy, which is a proceeding *in invitum*, was pointed out by Sir *W.*

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the course of such proceedings may be duly sent, and that resolutions passed at such meetings may be duly registered.

Rule 260 provides that "the Court may also, at any time after presentation of the Petition, appoint a receiver or manager of the property or business of the debtor, or of any part thereof; and may direct immediate possession to be taken of such property or business, or any part thereof."

Grant, M.R., in the leading case of *Shee* v. *Hale* (1); followed by *Wilkinson* v. *Wilkinson* (2).

Mr. *W. Pearson*, for the trustee under the liquidation:—

It must be admitted that the words "part from" necessarily imply an act of the tenant for life; and the question is, whether the thing in question is a thing which was actively done by the tenant for life, or is an operation of law.

That bankruptcy is not such an alienation as will work a forfeiture under such a clause appears from *Lear* v. *Leggett* (3), affirmed on appeal (4); and the same view was upheld in insolvency, where the Petition was presented by a creditor: *Pym* v. *Lockyer* (5).

In cases where the Petition was presented by the insolvent himself, the Courts, no doubt, have held that the condition has been fulfilled; and the question comes to this, whether there is such a resemblance between proceedings under the *Insolvent Debtors Relief Act* (1 & 2 Vict. c. 110), and proceedings for liquidation under the *Bankruptcy Act*, 1869, as to make the same rule applicable to both cases. Sect. 35 of the *Insolvent Act* provided that persons imprisoned for debt might petition the Court in a summary way, and that the Petitioner should in such Petition state "that he is willing" that all his real and personal estate should be vested in the provisional assignee; and then sect. 37 provides for such vesting order being made by the Court on the Petition of the creditors. But the proceedings as to liquidation by arrangement under the 32 & 33 Vict. c. 71, are totally different. The only act of the debtor (sect. 125) is the calling together of his creditors; there is no *cessio bonorum* on his part. The meeting may appoint a trustee, and the property of the debtor vests in the trustee from and after the date of his appointment. All, consequently, that follows the summons of creditors is mere operation of law. In *Rochford* v. *Hackman* (6) Sir *G. J. Turner* (then Vice-Chancellor) observes (7): "It cannot, I think, be said that a man has alienated when the alienation is made by the act of the law, and not by his

(1) 13 Ves. 404.
(2) Coop. G. 259; 3 Sw. 515.
(3) 2 Sim. 479.
(4) 1 Russ. & My. 690.
(5) 12 Sim. 394.
(6) 9 Hare, 475.
(7) 9 Hare, 484.

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own act; and if he has not alienated, there is no breach of the condition, and the life estate is not determined." In *Graham* v. *Lee* (1) it was held that a declaration of insolvency, which was the foundation of a subsequent bankruptcy, did not create a forfeiture.

[Mr. *De Gex*:—That was upon the petition of creditors.]

No doubt; the debtor made the declaration under which the creditors were able to proceed.

[The VICE-CHANCELLOR:—He merely committed an act of bankruptcy; that is all.]

So here the proceedings taken by this debtor amount to nothing more than an act of bankruptcy.

Upon the whole, the true construction is, that the event has not happened which is to deprive the tenant for life and his creditors of this income.

Mr. *Gardiner*, for the trustees of the will.

SIR JAMES BACON, V.C.:—

In this case I think it quite clear that a forfeiture has taken place.

In the case that has been referred to, of *Lear* v. *Leggett* (2), there was a hostile bankruptcy; and it was considered impossible to hold such a bankruptcy to be a voluntary act of the tenant for life, so as to bring him within the language of the clause in that case.

It has been held equally clear that the presentation of a Petition under the *Insolvent Debtors Act* was such an alienation of the debtor's property, such a putting it beyond his own reach by his own act, as would occasion a forfeiture under a similar clause. So it was decided by Sir *George Turner* in *Rochford* v. *Hackford* (3).

How then does the matter stand here? A new set of proceedings has been instituted by the *Bankruptcy Act*, 1869, for liquidation of a debtor's affairs by arrangement, without bankruptcy. What is the nature of those proceedings? The debtor presents a

(1) 23 Beav. 388. (2) 2 Sim. 479.
(3) 9 Hare, 475, 484.

Petition praying to have a meeting of his creditors summoned. At such meeting, when summoned, the creditors may appoint a trustee. From the date of the appointment of the trustee all the property of the debtor vests in the trustee, without an order, by force of the statute. The vesting follows as a matter of course on the appointment; it is simply consequential.

The presentation of the Petition is undoubtedly an act of bankruptcy; although it is uncertain, when the Petition is presented, whether bankruptcy will ensue or not. Presentation of the Petition may be followed by a liquidation by arrangement; and if it be so followed, then, upon the appointment of a trustee, the whole of the debtor's estate vests in the trustee; and the title of the trustee to the debtor's property relates back, if and when necessary, to the date of the presentation of the Petition, just as the title of the assignee in bankruptcy under the old law related back to the act of bankruptcy.

The Bankruptcy Rules provide that at any time after the presentation of the Petition, the Court may appoint a receiver of all or any part of the debtor's property, and may direct immediate possession to be taken of the same. A stronger case of alienation can scarcely occur than where a man does an act, the result of which is to enable the Court immediately to take possession of all that belongs to him.

Now in this instance the words of the clause of forfeiture are as follows:—[His Honour read the clause above]; and I must hold that the presentation of this Petition by this debtor, whereby he put it into the power of the Court immediately to appoint a receiver of all his property, was a "parting from" his life interest in the fund within the meaning of the clause.

Solicitor for the Petitioners: Mr. *John Yarde*, agent for Messrs. *Whidborne & Tozer, Teignmouth.*

Solicitors for the Trustee in Liquidation: Messrs. *Terrell & Chamberlain*, agents for Messrs. *Terrell & Petherick, Exeter.*

Solicitors for the Trustees of the Will: Messrs. *Frere, Cholmeley, Forster, & Frere.*

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CADMAN *v.* CADMAN.

[1870 C. 145.]

Will—Conversion—Navigation Shares—Personal Estate and Effects.

After a devise of "all my real estate" upon certain trusts, testator appointed *B.* his executor, and gave to him "all my railway, canal, and navigation shares, moneys, and personal estate" upon trust for payment of debts and legacies, and gave "the residue and overplus of my personal estate and effects," after the payments thereinbefore mentioned, unto *C.*, her executors and administrators, absolutely.

The navigation undertaking, in which testator held two shares, became vested in a railway company under an Act of Parliament which provided for the extinguishment of the freehold rights in the shares upon a conveyance to the railway company by the holder, who was to be thereupon entitled to receive shares in the railway company. No conveyance of the shares to the railway company was executed by testator, and they were at his death standing in his name in the share register of the navigation company in possession of the railway company:—

Held, that the effect of the Act of Parliament was to convert the shares into personal estate, but that even if unconverted, they would pass under the residuary gift of testator's personal estate and effects.

Special Case.

William Carr, by his will, dated the 7th of June, 1862, after a devise of real estate in *Fenwick*, devised all and every his residuary real estate, and every part and parcel thereof, with their appurtenances (subject to the several life annuities and legacies thereinafter charged thereon), to the use of *William Cadman* for life, with remainder to the use of *Margaret Cadman*, wife of *William Cadman*, for life, for her separate use, without power of anticipation, with remainder to the use of *William J. S. Cadman*, their eldest son, for life, with remainders over in strict settlement, and an ultimate remainder to *Margaret Cadman* in fee. After then giving several life annuities charged on the rents of his residuary real estates, amounting to £165 per annum, and giving powers for charging portions and jointures on his residuary real estates, and powers of granting building and farming leases; and after giving and devising to *William Cadman*, his heirs, executors, and assigns, all real and personal estates vested in him (testator) as

trustee or mortgagee, subject to the rights of redemption and trusts affecting the same, respectively, proceeded as follows: "I appoint the said *William Cadman* sole executor of this my will, and I give to him all my railway, canal, and navigation shares, moneys, goods, chattels, rights, credits, and personal estate, but only on the trusts, and to fulfil the purposes hereinafter specified." These trusts were, first, as to certain specific articles, that they should be held as heirlooms; in the next place, to raise, provide, and set apart, out of such parts only of his personal estate not before disposed of as might be lawfully given for charitable purposes, a charitable fund of sufficient amount to pay all legacies and bequests of a charitable kind. After giving several charitable legacies to be paid out of such charitable fund, testator directed his executors, out of the remainder of his residuary personal estate, to pay his debts, funeral and testamentary expenses, and the legacies thereinafter given (with a direction that his farming stock therein described should be kept up and go along with his residuary real estate); and gave all the residue and overplus of his personal estate and effects remaining after payment of and provision for all the matters thereinbefore, and in any codicil or codicils thereto, mentioned, unto *Margaret Cadman*, her executors and administrators, absolutely, and for her and their own use.

The testator, who died in October, 1863, was, at the date of his will and his death, owner, in addition to real estate of great value, of two shares in the *River Dun Navigation* undertaking, which was constituted under certain Acts of Parliament in the reigns of *George* I. and *George* II., with a provision that a sale of the shares should be in the form set forth, "to hold to him (the purchaser), his heirs and assigns;" and that every grant and transfer of any share in the undertaking, being entered in a book by the Act directed to be kept for that purpose, should be a good conveyance of the vendor's estate of inheritance in such shares to the vendor, his heirs and assigns, without registration in the *West Riding Registry Office.*

By the *South Yorkshire Railway Act*, 1847, the property of the *River Dun Navigation* became vested in the railway company, and each holder of one share in the navigation, after the passing of the Act, and execution of the conveyance therein specified to the com-

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pany, was to be entitled to 150 shares in the company, and thereupon such share and the freehold rights thereto appertaining were to be absolutely extinguished. Power was also given to the company, within ten years from the opening of the railway, to purchase for £3000 each share in the navigation. After proof that half the capital of the company had been actually paid up and expended, the *Dun Navigation* should be dissolved for all purposes, except such as might be necessary for winding up its affairs. It was also enacted that after the passing of the Act, and such proof as aforesaid, all powers &c., in the *Navigation Acts* contained in reference to the purchase, sale, transfer, and acquisition of shares, and the registration of the holders, should be, and continue in force, and be executed by the railway company as to such of the shares as should not be purchased and vested in the railway company.

By the *South Yorkshire Railway and River Dun Act*, 1850, an option was given to persons authorized to execute a conveyance of navigation shares to the railway company to accept preferential shares; and, after reciting that proof had been made that half the capital had been paid up and expended for the purposes of the Act of 1847, and that the *River Dun Navigation* had become vested in the company, it was enacted that the title of the company should be "*The South Yorkshire and River Dun Railway Company.*" By a subsequent Act, passed in 1864, the undertaking of the company became vested in the *Manchester, Sheffield, and Lincolnshire Railway Company.*

No conveyance of the testator's two navigation shares was ever executed to the *South Yorkshire* or to the *Manchester, Sheffield, and Lincolnshire Railway Company,* and testator never accepted any shares in either of the railway companies in lieu of his navigation shares, nor did he sell such shares to either of the companies, and at the time of his death the shares were standing in his name on the register of shareholders of the *River Dun Navigation,* now in possession of the *Manchester, Sheffield, and Lincolnshire Railway Company.* Probate of testator's will had since been inrolled in the *Dun Navigation* book of record, and the shares had been transferred into, and were now standing in, the name of the Defendant *William Cadman* in the shareholders' register of the navigation company.

The questions raised by the special case were, first, whether the two navigation shares to which testator was entitled at the time of his death were real or personal estate of testator at his death, and whether they passed under the bequest to *William Cadman* of all testator's railway, canal, and navigation shares, moneys, &c., and personal estate on the trusts, and to fulfil the purposes specified; secondly, whether the shares were subject to the limitations of the will respecting testator's residuary real estate, or passed under the ultimate bequest of all the residue and overplus of his personal estate to *Margaret Cadman*.

Mr. *Fry*, Q.C., and Mr. *Otter*, for the Plaintiffs (the children of *William* and *Margaret Cadman*), contended that the navigation shares, which were originally real estate (not having been conveyed to the railway company), had never lost that character, and were subject to the limitations affecting the residuary real estate.

[They cited *Latham* v. *Barber* (1); *Belaney* v. *Belaney* (2)].

Mr. *Eddis*, Q.C., and Mr. *Higgins*, for *William Cadman*:—

There was a complete conversion of these shares into personal estate during the testator's lifetime by virtue of the provisions of the Acts of Parliament: *Ex parte Hawkins* (3); *Galliers* v. *Allen* (4); *Richards* v. *Attorney-General of Jamaica* (5). But, assuming the shares to have remained in their original condition of real estate, they passed to *Margaret Cadman* under the gift to her in the will of testator's "personal estate and effects," it being a canon of construction that words applicable exclusively to personal estate have sometimes, by the force of the context shewing the manifest intention of testator, been held to include real estate; and on this principle the word "effects," though applicable strictly to personalty only, has been held to comprehend the several particulars before mentioned, consisting of both real and personal estate: *Jarman* on Wills (6); *Milsome* v. *Long* (7); *Hayes* v. *Hayes* (8);

(1) 6 T. R. 67.
(2) Law Rep. 2 Ch. 138.
(3) 13 Sim. 569.
(4) Ibid. 577, n.
(5) 6 Moo. P. C. 381.
(6) Vol. i. p. 708.
(7) 3 Jur. (N.S.) 1073.
(8) 1 Keen, 97.

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Mills v. *Brown* (1); *Marquis of Titchfield* v. *Horncastle* (2); *Doe* v. *Tofield* (3); *Jones* v. *Green* (4).

Mr. *Langworthy*, for *Margaret Cadman.*

Mr. *Otter*, in reply, referred to *Longley* v. *Longley* (5).

SIR JAMES BACON, V.C.:—

On the authority of the cases, it is plain that as soon as the Act of Parliament providing for the ultimate absorption of the navigation in the railway company was passed the navigation shares became converted in equity, and would pass under a bequest of personal estate. Independently of that, however, and if the navigation shares remained real estate and unconverted, then, on the whole scope of the will, by which they were dealt with as personal estate, they would pass under the residuary gift of testator's personal estate and effects to *Margaret Cadman.*

Solicitors: Mr. *G. M. Saunders;* Mr. *T. W. Payne.*

V.-C. B. 1872 *Jan.* 18, 20.

In re UNITED PORTS COMPANY.

ADAMS' CASE.

Winding-up—Contributory—Allotment—Attempted Withdrawal.

Upon the purchase of the business of company *A.*, and amalgamation with the purchasing company (*B.*), the shareholders in company *A.* were entitled to receive shares in the amalgamated company in exchange for the shares held by them in company *A.*, and a form of application was sent to the *A.* shareholders for their signature, requesting an allotment of shares in the amalgamated company, with an agreement to accept the same, and an authority to insert their names in the register of shareholders.

X., one of the *A.* directors and shareholders, signed the form of application for fifty shares, and a resolution was passed on the 22nd of April, 1869, and confirmed on the 29th, for allotting the same to him. On the 15th of

(1) 21 Beav. 1.
(2) 2 Jur. 610.
(3) 11 East, 246.
(4) Law Rep. 5 Eq. 555.
(5) Law Rep. 13 Eq. 133.

May *X.* wrote withdrawing his application, as he had determined to take no shares, requesting the directors not to allot any shares to him, and to return his application. The consideration of this letter was from time to time postponed, and *X.* was put off with assurances that no shares had been allotted to him. On the 15th of August, in answer to a letter from *X.*'s solicitor, threatening immediate legal proceedings to restrain the company from placing his name on the register as a shareholder unless the promised minute cancelling his application for shares was received by return of post, the solicitor of the company wrote stating that at the last meeting of the directors "a resolution was passed cancelling the allotment of shares to" *X.* No entry of such a resolution was to be found in the minute books, and its existence was denied by one of the directors who was present at the meetings before and after the 15th of August:—

Held, that *X.* was liable as a contributory, the allotment of shares to him being complete by the terms of the arrangement between the two companies as soon as the resolution acceding to his application was entered in the book; and that, independently of there being no evidence that the allotment was ever cancelled, the directors had no power to release a shareholder who wished to have his shares cancelled.

THIS was an application on behalf of the official liquidator of the *United Ports Company* that the name of Mr. *Adams* might be settled on the list of contributories under the winding-up of this company in respect of fifty shares.

Previously to the incorporation of the *United Ports Company*, which was a company with unlimited liability, the promoters, towards the end of 1868, entered into negotiations with the *Bristol Marine Insurance Company* for a purchase of their business and an amalgamation of the two companies. These negotiations resulted in articles of agreement, dated the 6th of March, 1869, being entered into between the two companies for an amalgamation and for a purchase of the business of the *Bristol Company* for £15,000, of which sum £10,000 was to consist of 10,000 shares of £1 each, fully paid up in the *United Ports Company*, to be issued to shareholders in the *Bristol Company* as the directors should point out, and £5,000 to be lodged with trustees for payment over to the *Bristol* shareholders. Meetings for the purpose of adopting the agreement were held by both companies, and at the meeting of the *Bristol Marine Company* it was resolved, and afterwards confirmed, that, to facilitate the carrying out of the agreement, the *Bristol Company* should be wound up voluntarily under the supervision of the Court. In pursuance of the agree-

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ment, the following forms of application for shares in the *United Ports Company* were sent to the respective members of the *Bristol Marine Company*:—

"To the Directors of the *United Ports and Insurance Company.*

"Gentlemen,—I request you will allot me —— shares in the above-named company of one pound each, fully paid up, and I agree to accept the same; and I hereby authorize and empower you to insert my name in the register of shareholders of the company for the number of shares allotted to me, and I accept the same pursuant to the agreement with the *Bristol Marine Insurance Company, Limited;* and I hereby declare that I accept the same in full discharge of all claims and demands, subject nevertheless to the cash payment, as per agreement, of 10*s.* per share returnable on the shares held in the *Bristol Marine Insurance Company, Limited.*

Name in full.

Address.

Occupation.

Place of business (if any).

No. of shares held in the *Bristol Marine*, &c."

Together with the form of application a printed letter signed by the secretary of the *United Ports Company*, and in the following terms, was sent to the shareholders of the *Bristol Company*:—

"I have the pleasure to announce that the agreement for amalgamation between the *Bristol Marine Insurance Company, Limited*, and this company has been duly ratified by the shareholders of both companies, whereby the *Bristol Company*, with the whole of its business, assets, and liabilities, have been merged into the *United Ports and General Insurance Company*, which company will henceforth assume the engagements that have been contracted by the *Bristol Company*. In carrying out this amalgamation this company requests you to sign the annexed form of application for shares of £1 fully paid up, being share for share held by you in the *Bristol Company*, and return the same immediately in the accompanying envelope. By the terms and conditions of the said amalgamation each shareholder in the *Bristol Company* is entitled to receive one share of £1 in the *United Ports*

Company for every share with £2 paid thereon held in the *Bristol Company*, with a further payment of 10*s.* per share in cash.

Adams, who was a shareholder and director of the *Bristol Company*, and was present at several of the meetings of that company at which the question of the proposed amalgamation was discussed, signed in April, 1869, for fifty shares the form of application that had been sent to him. At a meeting of the directors of the *United Ports Company* held on the 22nd of April, 1869, his application for shares with those of other *Bristol* shareholders was submitted to the board, and a resolution passed that the same be allotted. The minutes containing this resolution were read and approved at the next meeting on the 29th of April, 1869. Shortly after signing this application *Adams*, finding, as he alleged, that he had been under a mistake as to his being free from all further liability upon shares taken in the *United Ports*, on the 15th of May, 1869, wrote to the secretary of the company as follows:—

"Some time since I signed a printed application sent me by your company respecting fifty shares to be taken in exchange for others in the *Bristol Marine Insurance Company*. I now beg to withdraw from the same, as I have determined to take no shares in exchange. You will please, therefore, not allot any shares for me as I prefer making your company a present of them. I shall feel obliged by your reply, and also an acknowledgment that the shares are cancelled, and by your sending back the document signed by me."

Not receiving any reply, Mr. *Adams* wrote on the 20th and 22nd of May, and also on the 7th and 9th of June, reiterating his decision not to accept shares in the company, and declining to receive or acknowledge any allotment. On the 5th of July *Adams* instructed his solicitors to take immediate proceedings to have his application for shares cancelled and the form of application returned to him. Some correspondence and communications took place between *Adams*' solicitors and the secretary and solicitor of the company, who stated that no shares in the company had been allotted to Mr. *Adams*, and produced what purported to be the application and allotment book from which it appeared that, although the name of *Adams* was entered as an applicant for fifty shares, no shares were entered in the allotment column of the

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book as having been allotted to him. The shares allotted to the applicants whose names immediately preceded and followed his name were also numbered consecutively, without any gap for his shares.

On the 13th of August, 1869, *Adams'* solicitors wrote that if they did not receive by return of post the promised minute of the board, which was to be passed to satisfy them that all liability on *Adams'* part in respect of his application for shares was satisfied, an injunction would be at once applied for to restrain the company from placing his name on their register as a shareholder.

In reply, the solicitor of the company wrote, on the 14th of August, 1869:—

"At the last board meeting of the directors a resolution was passed cancelling the allotment of shares to your client, Mr. *Adams*;" and he deposed that the resolution was passed in his presence.

The minute book contained no entry of any such resolution, and one of the directors who was present at the meetings held on the 12th and 19th of August, 1869, stated that he never knew of any resolution to that effect having been passed, and that no such resolution was passed at either of the above-mentioned meetings. Nothing further was done by *Adams*, and no application was made to him in respect of the shares by the company, which was ordered to be wound up on the 6th of November, 1869.

On behalf of the official liquidator, in support of the application to place *Adams* on the list, Mr. *Goodlatte*, one of the directors, deposed that on the 22nd of April fifty shares were allotted to *Adams*, and his name was accordingly entered in the allotment book, which was the only allotment book in use at that time, the register not being at that time made up, and that his name thus entered was shewn to shareholders in the *Bristol Marine Company*, who wished to see who had consented to exchange their shares for shares in the *United Ports*. *Goodlatte* also stated that the consideration of the letters of *Adams* withdrawing his application for shares was (as appeared from the minute books) from time to time deferred, the directors not being willing, as he was the only *Bristol* director who had exchanged, to let him off if they could help it, and also thinking they had no power to cancel his application. The deponent never knew of any resolution having been passed

cancelling the allotment, and stated that no resolution to that effect was passed at the meeting of the 12th of August, 1869, at which he was present, and that being also present at the next meeting on the 19th of August he should (if any such resolution had been passed) have called attention to the omission of it from the minutes. He also stated that *Edmonds* was solicitor of the company, was anxious to get the allotment cancelled, and constantly urged the directors to do so, as *Adams'* solicitor was pressing him in the matter.

The minute books of the company of the 22nd and 29th of April, 1869, contained the passing and confirmation of the resolution to allot shares to *Adams* and the other *Bristol* applicants, but no minute of any resolution cancelling such allotment was to be found in the books. The share register, which was not made until July, 1869, did not contain any entry of *Adams'* name.

Mr. *Amphlett*, Q.C., and Mr. *Brooksbank*, for the official liquidator:—

Having regard to the terms of the agreement for exchange of shares stated in the letter of the secretary, and the form of application, which was unconditional, notice of the allotment was unnecessary, as the company had sent an offer by which they were bound, and under which, on receiving back the application filled up and signed, a contract complete and binding on both sides was constituted: *Tucker's Case* (1); *Bloxam's Case* (2). *Adams* having become a member of the company by virtue of the allotment made on the 22nd of April, 1869, the directors had no power to release him, and in point of fact they never did release him, it being distinctly sworn by *Goodlatte*, one of the directors, that the allotment was never cancelled, while the *agenda* and minute books contain no trace whatever of such alleged cancellation.

Mr. *Kay*, Q.C., and Mr. *Graham Hastings*, for *Adams*:—

Tucker's Case is clearly distinguishable. There *Tucker's* name was placed on the register, and he never did anything to recall his application. He simply relied on the fact that the company never sent him any notice of the allotment having been actually made;

(1) 20 W. R. 88. (2) 33 Beav. 529; 33 L. J. (Ch.) 574.

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but *Levita's Case* (1) was a complete answer to his contention. There was no contract binding on *Adams* to accept shares, as a mere application for shares, followed by a registration not communicated to the applicant, does not constitute a completed transaction: *Pellatt's Case* (2); *British and American Telegraph Company* v. *Colson* (3); and, *à fortiori*, is this the case where, before the fact of the allotment has been communicated, the applicant withdraws his application: *Hebb's Case* (4). In this case no valid allotment was ever made to *Adams*. His name was never entered in any book that could properly be called a register of members. His name was merely entered in the application book, and while the shares were all allotted in regular succession, against the name of *Adams* alone no numbers were inserted, although the *Companies Act*, s. 25,] requires that every company shall keep a register of its members, and an entry in the register of "the names and addresses, and the occupations, if any, of the members of the company, with the addition, in the case of a company having a capital divided into shares, of a statement of the shares held by each member, distinguishing each share by its number." Even assuming that an allotment was made, the directors, under the authority given to them by the articles of association of compounding any claim or demand, and compromising any legal proceedings, had full power to cancel, and, as we submit, did absolutely cancel, the allotment in order to prevent the legal proceedings which were threatened, and would have been taken, by *Adams* to get the allotment cancelled, and were only stopped on the assurance of the company's solicitor that the resolution cancelling the allotment had been passed. There being no entry upon the share register of *Adams'* name, there was nothing to affect creditors or the world generally with notice that *Adams* was a shareholder; and the arrangement by which, in consideration of the withdrawal of legal proceedings, his application for shares was cancelled was perfectly valid, and cannot now be disturbed: *Lord Belhaven's Case* (5); *Snell's Case* (6); *Pawle's Case* (7).

(1) Law Rep. 3 Ch. 36.
(2) Ibid. 2 Ch. 527.
(3) Ibid. 6 Ex. 108.
(4) Law Rep. 4 Eq. 9.
(5) 3 D. J. & S. 41.
(6) Law Rep. 5 Ch. 22.
(7) Law Rep. 4 Ch. 497.

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The first question is as to the effect of the application for shares. Now, considering all the circumstances on the general principles laid down in *Levita's Case* (1) and *Bloxam's Case* (2), there can be no doubt in my mind that the application for shares made a contract between the company and the applicant. Without going into the circumstances in great detail, one company was to be wound up, an application being made to the Court, and an order made to that effect, and a contract was entered into for a purchase by the one company of the interests of the other; and it was on these terms that any shareholders in the old company were to be at liberty, if they thought fit, to exchange their shares for exactly the same numbers of shares in the new company, with a payment of 10*s.* per share, which was for equalising the interests. Although the terms of that arrangement are not expressed in the agreement, yet in the form of the letter of application which was furnished to Mr. *Adams* reference is made to this agreement as the basis of the transaction which is thus submitted to him; and he adopts that in his letter of application, and says that the application which he makes is based on the terms of that agreement, and he desires to have fifty shares in your company. Well, nothing was wanting on that to make a conclusive and binding agreement on the parties but acceptance by the company; and that that acceptance was given is one of the clearest things in evidence in this case. A resolution, duly passed and reduced into writing, was passed on the 22nd of April, and the fifty shares were thereby allotted to Mr. *Adams*. Now, the company being under a direct obligation to grant those shares to him discharged that obligation. They were not at liberty to grant him any less number of shares. They might have granted him more if he had come in as a new shareholder; but as respected his old connection with the other company, they could not grant him less, and they did grant him the shares, and did allot the shares in the most formal way that, according to the mode in which they carried on their business, it was practicable for them to allot them, on the 22nd of April. What they resolved was in writing, and the book in which the

(1) Law Rep. 3 Ch. 36. (2) 33 Beav. 529; 33 L. J. (Ch.) 574.

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effect of the resolution was expressed is also clearly in evidence. So that upon the first part of the case, I have no doubt that upon the 22nd of April the shares had been validly allotted to him. It remains to be considered whether what has since taken place authorizes that cancellation of the shares upon which he now insists.

First, then, what power had the directors to cancel these shares? I can read nothing to that effect in the articles. They are entitled to compromise disputes, but they are not at liberty to cancel an allotment of shares. If a litigation had ensued between them, and a bargain had been come to, and if a payment had been made, as in *Lord Belhaven's Case* (1), where a sum of £50 had been paid as a consideration, or offered, and, after approval by the directors, adopted by the general meeting, that would have unquestionably been a binding contract between the company—not the directors—but between the company and the shareholders. Is there anything like that in this case? Having changed his mind by the 15th of May, Mr. *Adams* writes and desires to have his application for shares withdrawn, and then ensues a great deal of correspondence. The consideration of his letter is, on the part of the company, postponed, adjourned, deferred in various ways. A threat is made by Mr. *Adams*' advisers that he will apply to have his name removed from the register of members. He is told that there is no register of shareholders; then he threatens a bill. Matters go on, and at that meeting of the 12th of August, according to the memorandum then made by Mr. *Edmonds*, the solicitor of the company, a resolution was passed by a body of persons in words that somebody else prescribes for them. It would be a most dangerous thing to adopt such evidence as Mr. *Edmonds* gives, even if he were not contradicted. But he is directly contradicted. It has been urged that Mr. *Edmonds* is disinterested, and that Mr. *Goodlatte* has a large interest. His interest does not disqualify him. An interested witness is just as good a witness as any other, unless you can fix upon him some circumstances which induce you to believe that he is misrepresenting the truth. If a resolution was passed, Mr. *Goodlatte* must have been a party to it. He denies that he was, or that he heard of any such resolution. It is quite clear that there

(1) 3 D. J. & S. 41. 11 Jur N S 573.

was an impression on *Edmonds'* mind that there had been such a resolution, but I cannot take that as evidence; and if it only stood on a conflict of statement between these two witnesses, I could not act upon it as a fact done. If it had been a compromise, there would have been some ground for the argument urged on behalf of Mr. *Adams;* but there is no trace of a compromise.

If I were to give the fullest effect, which I am not disposed to do unless compelled, to the article referred to, I should say that there is nothing here which brought it within the terms of that article. It would be putting into the hands of directors an almost unlimited power. I could not hold that the directors have power to release any shareholders who say they wish to have their shares cancelled, or that such desire would be reason enough for the directors to resolve that they should be discharged from the company. That would be to inflict a monstrous injury on the shareholders, and would be directly against the constitution of the company, and a violation of the powers of the directors, and it might happen in cases where it would be impossible to fix fraud on them. The evidence, then, of the alleged arrangement of the 12th of August has wholly failed. Then it is said that there never was any allotment. It is in evidence and not contradicted that the only book in which the fact of an allotment could be recorded is that which is called the allotment book, and the entry in it is perfectly clear, plain, and distinct. In answer to the application it is "resolved that the same be allotted." They are allotted from that moment; they are entered in the book at some convenient time afterwards, and in the only book in which they could be entered. There is no share register, but there is a book labelled outside "The Allotment Book."

No doubt the Act of Parliament requires that a register shall be kept; that is a direction given by the statute to the directors and enforced by a penalty. If it is not obeyed a penalty may be incurred, but what right does any one acquire by the omission of the company to keep such a book as the statute points out? Nor is the fact that no numbers of shares were inscribed against his name material. It cannot signify what numbers were allotted to him. The certificates must bear numbers, but they need not and may not be issued until the application for such certificates,

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and the shareholders can have them on paying the fees prescribed by the articles. But what does it signify whether the shares are numbered or not? For the allotment nothing is necessary but the number of the shares—in this case fifty. The numbers which describe the particular shares allotted need not be entered until the certificates are issued. Now, the certificates never were issued, and therefore the time never came in this case in which it was necessary to attach numbers to the shares. All the cases referred to justify the conclusion which I draw from those facts. *Bloxam's Case* (1) is directly in point. When it was heard on appeal (2), Lord Justice *Turner* concurred in the previous decision, and the Lords Justices held that the contract was binding when the allotment was made; and here I have clear, indisputable, unquestioned evidence that the allotment was made on the 22nd of April. In *Pellatt's Case* (3), which was supposed to be in some degree at variance with the decision in *Bloxam's Case*, the distinction is drawn between the case of an application for shares, where the directors are at liberty to allot or not either the number of shares he applies for or any smaller number, and a case where the company is under an obligation, if it grants the application at all, to grant the number of shares applied for. No doubt merely writing a line in a book does not amount to an allotment. But here Mr. *Adams* applied for fifty shares, in pursuance of a right on the part of the shareholders in the old company to ask for an allotment of a given number of shares, and the application is made and acceded to in the most formal, and indeed in the only, manner in which the company could act. Fifty shares are allotted to him, and the question is whether that contract is not perfect, full, and complete. I can attach no such importance as has been suggested to the correspondence—to the various struggles and attempts that were made by Mr. *Adams* and his advisers, and favoured by Mr. *Edmonds*, who, acting for the company, although he had no interest, had at least a duty to resist such a claim. I can attach no importance to what then took place, as, in my judgment, it did not in the least degree alter the fact of the allotment or absolve Mr. *Adams* from the obligation which he came under (his letter

(1) 33 Beav. 529. (2) 33 L. J. (Ch.) 574.
(3) Law Rep. 2 Ch. 527.

being accepted and the allotment made) as a member of the company, for fifty shares.

Finding, therefore, that there was a valid and unimpeachable contract, and that the effect of that contract was to make Mr. *Adams* the holder of fifty shares in the company, I can find no single fact upon which I should be justified in saying either that the directors were at liberty to cancel, or that, in point of fact, they had attempted to cancel, the shares. The dispute, as it may be said to have begun on the 15th May, remains in its full vigour to this day, and it is my duty to dispose of the question before me by finding that Mr. *Adams* ought to be on the list of shareholders for fifty shares. Although I attach no importance to it as influencing my decision on the main question, I do think that the conduct of the company was well calculated to mislead Mr. *Adams*, and therefore I do not make him pay the costs.

Solicitors: Messrs. *Argles & Rawlins;* Mr. *A. Pulbrook.*

MANNING *v.* GILL.

[1869 M. 135.]

Voluntary Deed—Apprehension of Conviction—Person of unsound Mind.

A., being in prison on a charge of felony, in order to avoid a forfeiture of his property in the event of a conviction, executed a voluntary deed, assigning his personal estate to *B.*, his brother, absolutely. *A.* was tried, found not guilty, on the ground of insanity, and ordered to be imprisoned as a lunatic during Her Majesty's pleasure:—

Held, that the deed, being without consideration, and executed by an insane person under a total misapprehension, was inoperative, and that the representatives of *B.* took no interest under it.

ROBERT GILL, by his will, dated the 5th of November, 1835, gave the residue of his real estate to *Thomas Manning* (the Plaintiff), upon trust to convey the same unto testator's son *Andrew* upon his attaining twenty-four. The testator also bequeathed his residuary personal estate unto his son *Robert Gill* and *Thomas Manning*, upon trust to transfer and assign one moiety unto *Andrew Gill* at and to be vested at his age of twenty-four years, and the

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other moiety unto testator's daughter *Rose Gill* at twenty-four or marriage.

The testator died in January, 1836. *Andrew Gill* attained twenty-four in 1850, but as he was of weak intellect, and considered to be incapable of managing himself or his affairs, no conveyance of the testator's real estate was ever made to him. In 1857 *Andrew Gill*, who was subject to ungovernable fits of passion under the influence of drink or any great excitement, when he was incapable of any control over himself, drew his knife in a quarrel with a companion and stabbed him. He was committed to gaol, and tried at the *Taunton* Spring Assizes in 1857, but was found not guilty on the ground of insanity, and ordered to be imprisoned as a lunatic during Her Majesty's pleasure, pursuant to the provisions of 39 & 40 Geo. 3, c. 94. On the 30th of March, 1857, the day before his trial, the solicitor employed to defend *Andrew Gill* visited him in prison, and, telling him that if he was convicted his real estate would be forfeited to the Crown, persuaded him to execute assignments of his real and personal property as a means of preventing a forfeiture in case of conviction. The deeds were at once prepared by the solicitor, who stated that the plan occurred to his own mind, and that he did not receive any instructions from *Robert Gill*, and that the deeds were read over and explained to *Andrew Gill*, who executed them with full knowledge and understanding of their contents and effect, being at the time under no excitement. By these deeds *Andrew Gill*, for a nominal consideration, conveyed all his real estate unto *Robert Gill* and his heirs, to the use of *Andrew Gill* and his assigns, during his natural life, and after the determination of that estate by any means in his lifetime or after his death to the use of *Robert Gill*, his heirs and assigns, for ever, for his and their own absolute use and benefit, and also granted and assigned all his personal estate unto *Robert Gill*, his executors, administrators, and assigns, for his and their own absolute use and benefit.

Andrew Gill was removed after his trial to the Government prison for criminal lunatics at *Broadmoor*, where he still remained. The rents of his real and the income of his personal estate were received, and, with the exception of small sums occasionally laid out for his comfort at the asylum, accumulated by *Robert Gill* in

the names of himself and *Manning*. Upon the death of *Robert Gill* the son in 1867, questions having arisen as to the persons entitled to the accumulated rents and income, *Manning*, who was anxious to be relieved from the trust, filed a bill to administer the estate of *Robert Gill* the father, so far as it related to the realty devised in trust for *Andrew Gill*, and also to carry into execution the trusts of the accumulated rents and income.

On the 5th of July, 1871, an order was made on further consideration, directing *Manning* and the executors of *Robert Gill* the son to pay into Court the balance in their hands arising from the property held in trust for *Andrew Gill*.

The persons beneficially interested under the will of *Robert Gill* the son had presented their Petition for payment to them of so much of the fund in Court as represented the accumulations of the personal estate assigned by the deed of the 30th of March, 1857, as forming part of *Robert Gill's* residuary personal estate.

Mr. *Kay*, Q.C., and Mr. *Freeling*, for the Petitioners:—

There is no suggestion of any undue influence, and as *Andrew Gill*, according to the evidence, was of sane mind, and perfectly understood the effect of the deeds when he executed them, and the event for which they were intended to provide has, in effect, happened—by his confinement so as to prevent him from enjoying his property—just as much as if there had been an actual forfeiture, the deeds are binding upon *Andrew Gill*, and the Court will give effect to them, and hold that there was a complete assignment of the personal estate to *Robert Gill* the son.

Mr. *Smart*, for *Andrew Gill's* guardian:—

If *Andrew Gill* should be at any time released from the criminal lunatic asylum, he would be entitled to get this deed, which was executed by him when insane, without proper explanation, and under a mistaken notion that his property was liable to be forfeited, set aside. Being executed after the offence for which he was tried, and before trial, it cannot be regarded as a *bonâ fide* settlement: *Saunders* v. *Warton* (1) The effect of the deeds was not fully explained to *Andrew Gill*, and they were executed by

(1) 11 W. R. 276.

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him under a mistake as to the law; and on either of these grounds they will not be held binding: *Phillipson* v. *Kerry* (1); *Birch* v. *Blagrave* (2); *Davies* v. *Otty* (3). The assignment of the personalty has never been acted upon by *Robert Gill*, who has shewn by his acts that he considered himself as a mere trustee for his brother without any beneficial interest.

Mr. *W. Karslake*, Mr. *F. Webb*, and Mr. *Badcock*, for other parties.

Mr. *Kay*, in reply:—

As against the party who executed it, and has not filed a bill to set it aside, the deed must be treated as valid. The fact that there was no conviction does not make the deed *ipso facto* void, but only voidable; and here no steps have been taken to impeach it. An instrument between two parties, though entered into for a purpose which may be considered fraudulent as against some third person, may yet be binding as between themselves: *Shaw* v. *Jeffery* (4); and the party who has executed it is estopped from setting up its invalidity: *Phillpotts* v. *Phillpotts* (5).

SIR JAMES BACON, V.C.:—

It is not too much to say that *Andrew Gill* has always been treated as insane. At the trial in 1857 he was proved to be a man of weak intellect, and subject to ungovernable fits of passion, and was found not guilty on that ground. If he had been sane these ungovernable fits of passion would have been no excuse. I agree there was no bargaining on the part of *Robert Gill*, but still he was a trustee. It remains, then, to be considered under what circumstances the deed executed by this insane man was executed. It is quite clear from the evidence that there was no motive on the mind of *Andrew Gill* in executing these voluntary deeds but to defeat a forfeiture in the event of his conviction for felony. This was a motive in the mind of an insane man, and the only event with a view to which these deeds were executed never occurred. *Robert Gill* knew that he was a trustee, and no less a trustee after than

(1) 11 W. R. 1034.
(2) Amb. 264.
(3) 34 L. J. (Ch.) 252.
(4) 13 Moo. P. C. 432.
(5) 10 C. B. 85.

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before the execution of the deeds, and he never touched any portion of the money. The deed was a purely gratuitous deed, executed by an insane man under a total misapprehension, and for a purpose which has not taken effect, and no effect can be given to it in favour of the Petitioners claiming under *Robert Gill.* The deed was wholly inoperative, and I cannot order payment of the money to the Petitioners.

Solicitors: Mr. *Moon;* Mr. *William Smith;* Messrs. *Vizard, Crowder, & Co.*

V.-C. B.
1872
March 14.

In re BEAK'S ESTATE.
BEAK *v.* BEAK.

[1870 B. 272.]

Donatio Mortis Causâ—Gift of Cheque with Delivery of Bank Pass-book—Cheque not presented in Donor's Lifetime.

The delivery by a donor, in his last illness, of a cheque on his bankers was accompanied by a delivery of his bankers' pass-book. The cheque not having been presented until after the donor's death:—

Held, that the gift was not a good *donatio mortis causâ.*

18 Eq 478
15 CLD 453
19 CLD 411

ADJOURNED SUMMONS.

In the administration of the estate of *Daniel Beak*, an intestate, a claim for £4000 was made by his nephew, *Isaac Beak*, under these circumstances:—

In May, 1864, the claimant went to live with his uncle, who was a farmer at *Kempsford, Gloucestershire,* and assisted him to carry on his business. On Monday, the 11th of July, 1870, the intestate, being in his last illness, requested his housekeeper to draw a cheque on his bankers, in favour of the claimant, for £4000. This she did, and the intestate signed it. He locked it up in his bureau, and, when he saw the claimant on the same day, did not allude to the subject further than to say to him, "The cheque will be all right." Upon the claimant asking "What cheque?" the intestate said that he (the claimant) would very soon know.

On the afternoon of Thursday, the 14th, the intestate asked for his nephew; and on being told he was out, requested the housekeeper to give him the cheque and his bankers' pass-book, and at

V.-C. B. 1872 *In re* Beak's Estate. Beak v. Beak.

the same time told her there were some little bills to pay and some small cheques to go into the bank. The intestate then signed a cheque in blank to pay the little bills, and told the housekeeper that there was plenty of money remaining to meet the cheque in the claimant's favour.

On the evening of the same day the claimant went to his uncle's, and received from the housekeeper the cheque and the bank-book. He then went to his uncle's room, saw him, and thanked him.

At about three o'clock on the afternoon of Friday, the 15th of July, the intestate died. On the following day the claimant presented the cheque at the bank at *Cirencester;* but on his mentioning to the bank clerk the fact that his uncle was dead, payment was refused.

The balance at the bank to the credit of the intestate at his death was £4840 15*s.* 6*d.*

Mr. *Amphlett*, Q.C., and Mr. *W. Karslake*, for the claimant:—

It is not denied that the gift of a cheque by the drawer during his lifetime, not presented till after his death, cannot be maintained as a transaction *inter vivos*, because something more was required to have been done.

But the question is different—whether it may not be supported as a *donatio mortis causâ?* There is, no doubt, a difficulty here, but it may be removed by the circumstance of the additional delivery of the bankers' pass-book. Although the pass-book did not contain, and was not evidence of, any agreement or contract on the part of the bankers to pay the debt, yet its delivery was a representation by the intestate that there was a debt due to him, out of which the sum stated in the cheque might be paid.

In *Hewitt* v. *Kaye* (1), where Lord *Romilly*, M.R., decided that the simple gift of a cheque by the drawer not presented by the drawee till after the donor's death was not a good *donatio mortis causâ*, His Lordship expressly excepted the case of where, as in *Amis* v. *Witt* (2), "the donor gave the donee a document, by which the bankers acknowledged that they held so much money belonging to the donor at his disposal; and it was held that the delivery of that document conferred upon the donee the right to receive the

(1) Law Rep. 6 Eq. 198. (2) 33 Beav. 619.

money." In this instance the delivery of the pass-book was equivalent to the gift of the deposit note in *Amis* v. *Witt* (1).

[They also cited *Bromley* v. *Brunton* (2).]

Mr. *Kay*, Q.C., and Mr. *Cookson*, for the Plaintiff; and

Mr. *Swanston*, Q.C., and Mr. *Graham Hastings*, for the Defendant, the administrator.

Sir James Bacon, V.C.:—

I think this case is covered entirely by authority.

The only circumstance that seemed at first sight to distinguish it was the delivery of the bankers' acknowledgment of debt. But the difference between a deposit note, which was the document delivered over in the case of *Amis* v. *Witt*, and a pass-book is enormous. A pass-book is not in any degree in the nature of a bond or an agreement.

The estate of the intestate has to be administered by his representatives; and the authorities are clear and distinct, that where a man draws a cheque and gives it to somebody, if that cheque is not presented till after the donor's death, for the amount of the cheque his estate is not liable. I cannot see that the delivery of the bank pass-book makes any difference. It is said to amount to a representation by the intestate that the bank were indebted to him in the amount stated. I am not sure that it did amount to such a representation; and if it did, I do not see how such a representation distinguishes the case from the authorities that have been cited.

It is, no doubt, very unfortunate that the intention of the parties should have been disappointed by the death of the donor; but though I regret the result, I cannot alter the law.

The claim must be disallowed; and I cannot allow the claimant any costs.

The costs of the Plaintiff and Defendant will come out of the estate.

Solicitor for the Claimant: Mr. *Crowdy*.

Solicitors for the Plaintiff: Messrs. *Price & Bolton*.

Solicitors for the Defendant: Messrs. *Deane & Chubb*, for Mr. *Chubb, Malmesbury*.

(1) 33 Beav. 619. (2) Law Rep. 6 Eq. 275.

V.-C. B.
1872
March 16.

ASTON *v.* MEREDITH.

[1869 A. 34.]

Practice—Partition Act, 1868—*Payment out of proceeds of Sale.*

The Court will not make an order for payment out to trustees of money produced by a sale under the *Partition Act*, 1868, where it had been paid into Court, and some of the persons interested were married women, and resident in *Australia*.

THIS was a suit instituted under the *Partition Act*, 1858 (31 & 32 Vict. c. 40), for a sale in lieu of partition. At the original hearing of the cause inquiries were directed as to who were the parties interested, and in what shares. At the hearing on first further consideration a sale was directed. The case is reported (1), where the facts are fully stated. The property having been sold, and the purchase-money paid into Court, the cause now came on for hearing on second further consideration.

The property was divisible into thirteenths. One of the persons interested was an infant. Four of the persons interested, two of whom were married women, were resident in *England;* and the persons entitled to the other shares, two of whom were married women, were resident in *Australia*. The purchase-money had been invested, and was now represented by £12,500 2*s*. 5*d*. consols.

Mr. *Kay*, Q.C. (Mr. *L. Field* with him), for the Plaintiffs (the surviving trustee of the settlement, and his wife, who was entitled to one share), asked that the fund in Court, with the exception of the infant's share, which was to be carried to her separate account, might, under sect. 23 of the *Leases and Sales of Settled Estates Act* (19 & 20 Vict. c. 120), which is incorporated in the *Partition Act*, 1868 (31 & 32 Vict. c. 40, s. 8), be paid over to the Plaintiff, the surviving trustee, or to have a new trustee to be approved by the Court, in order that it might be paid by them to the persons entitled. In consequence of many of the persons interested being in *Australia*, great delay and expense would be incurred if these shares were ordered to be paid out to them in

(1) Law Rep. 11 Eq. 601.

the usual manner, and powers of attorney had consequently to be obtained. He referred to cases under the *Lands Clauses Consolidation Act*, 1845, and other cognate Acts, in which similar orders had been made: *Re Roberts* (1); *Grant* v. *Grant* (2); and distinguished the present case from *Higgs* v. *Dorkis* (3), in which Vice-Chancellor *Wickens* had declined—a married woman and an infant being the only persons interested—to order the money produced by a sale under the Act to be paid to trustees.

Mr. *E. C. Dunn*, for the Defendant and persons served with notice of the decree (the other persons interested), supported the application.

SIR JAMES BACON, V.C., said that, although he was always anxious, where it was possible, with due regard to the protection of the persons interested, to save as much as possible delay and expense, he did not think he should, under the circumstances of the case, be justified in making the order applied for. The fund must accordingly be paid out to the persons interested in the usual manner.

Solicitors for all parties: Messrs. *Field, Roscoe, Field, & Francis.*

HARDING *v.* HARDING.

[1870 H. 10.]

Mortgage—Administration—Vendor's Lien—30 & 31 *Vict. c.* 69.

A lien for unpaid purchase-money is not a charge by way of mortgage, under statute 30 & 31 Vict. c. 69, where the purchaser dies intestate.

FURTHER CONSIDERATION.

John Martin Harding died intestate on the 11th of November, 1867, having in his lifetime contracted with the Ecclesiastical Commissioners for the purchase of the reversion in fee simple ex-

(1) 7 Jur. (N.S.) 818; 9 W. R. 758. (2) 6 N. R. 347.
(3) Law Rep. 13 Eq. 280.

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pectant upon a church lease for years, which was equitably vested in him, of certain hereditaments which had belonged to the See of *Durham*. The intestate had accepted the title, and nothing, at his death, remained to complete the transaction but the payment of the purchase-money and the execution of the conveyance.

The heir-at-law instituted this suit against the administratrix to have the intestate's personal estate administered, and to have the contract carried into effect for his, the heir's, benefit at the expense of the personal estate.

Mr. *Kay*, Q.C., and Mr. *Horton Smith*, for the Plaintiff, submitted that the heir was entitled to have the contract so carried into effect. Mr. *Locke King's Act* (17 & 18 Vict. c. 113) had been held not to extend to a lien for unpaid purchase-money: *Hood* v. *Hood* (1); *Seton* on Decrees (2); and although by the *Amendment Act* (30 & 31 Vict. c. 69), s. 2, the word "mortgage" in the construction of these statutes had been extended to any lien for unpaid purchase-money upon any lands or hereditaments purchased by a testator, that extended meaning of the word "mortgage" did not apply to the case of contracts entered into by intestates.

[They also referred to *Dart's* Vend. and Pur. (3).]

Mr. *Tremlett*, for the administratrix, and Mr. *Currey*, for some of the next of kin, submitted the point to the Court.

The VICE-CHANCELLOR thought the heir-at-law was entitled to the relief he sought. The language of the *Amendment Act* was express, and the present was a *casus omissus* therein.

Solicitors: Messrs. *Sharp & Ullithorne*; Messrs. *Rogerson & Ford*.

(1) 5 W. R. 747; 3 Jur. (N.S.) 684. (2) Page 275.
(3) Page 670.

In re PARKER'S ESTATE.

V.-C. B. 1871 Dec. 16.

Lands Clauses Act, 1845—*Reinvestment—Costs.*

On the Petition of all parties interested a railway company was ordered to pay the costs of a reinvestment in freeholds of a fund in Court representing the proceeds of leasehold houses taken by the company.

WILLIAM PARKER, by will dated the 30th of March, 1837, bequeathed his leasehold messuages in *Northampton Street, Islington*, held by him for the residue of a term of sixty-six years, from the 25th of December, 1824, and ground rents of £16 per annum, arising out of leasehold messuages in *Essex Street*, held for a term of sixty-three years, from the 25th of December, 1821, to his son *William Parker* for life, and after his death upon trust for all his children who should attain twenty-one years. The lands in *Essex Street* were taken by the *Great Northern Railway Company*, and the purchase-money, £330, was, in 1852, upon the Petition of *William Parker*, the tenant for life, laid out in the purchase of a leasehold house in *Islington*. In 1870 the *Northampton Street* leaseholds were taken by the *Great Northern Railway Company* for the purposes of their undertaking, and the sum of £1804 was paid into the bank in respect of purchase-money. Of this sum £1080 was invested in land. A contract having been entered into by *William Parker* for the purchase of two freehold houses at *Reigate*, he and his children, all of whom had attained twenty-one, had presented a Petition praying that the purchase of the freehold houses might be approved as a fit and proper purchase wherein to invest the balance in Court of the purchase-money of the *Northampton Street* leaseholds.

Mr. *Everitt*, in support of the Petition.

Mr. *T. Stevens*, for the *Great Northern Railway Company*, objected to paying the costs of this second reinvestment. The proposed purchase of freeholds with a fund derived from personal estate (leaseholds) was not a reinvestment authorized by sect. 69 of the *Lands Clauses Act*, 1845, of "lands to be conveyed, limited,

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and settled upon the like uses, trusts, and purposes, and in the same manner, as the lands in respect of which the money shall have been paid stood settled," of which alone, under sect. 80, the company would be ordered to pay the costs. The entire nature of the property, contrary to the intention of the Act, would be changed by this conversion of leaseholds into freeholds, so that it would be impossible to settle the lands purchased "upon the like uses, trusts, and purposes." The Petitioners were all *sui juris*, and entitled between them to the whole fund absolutely. Let them take the money and do what they like with it, but the company ought not to be ordered to pay the costs of the purchase, especially as they had already paid the costs of a reinvestment of part of the fund.

SIR JAMES BACON, V.C., was of opinion that the proposed reinvestment was substantially a settlement upon the like uses, and made the order as prayed, and directed the costs to be paid by the company according to the Act.

Solicitors: Mr. *C. E. Freeman;* Messrs. *Johnston, Farquhar, & Leech.*

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[1863 B. 188.]

V.-C. W.
1872
Feb. 9, 16, 17.

Solicitor and Client—Friendly Suit—Infant Plaintiff—Adoption of Suit—Charge on Real Estate "preserved"—22 & 23 Vict. c. 127, *s.* 28.

The bill in this suit was filed on the 15th of June, 1863, by *M. J.*, as next friend of the then infant Plaintiff, for a guardian, directions as to the maintenance of the Plaintiff and his brothers and sisters (Defendants), accounts of the estate of the testator (their grandfather), and for a receiver. The solicitor employed by the next friend was a Mr. *J.* On the 4th of July a decree was made, directing inquiries as to the testator's real estate; and on the 6th of February, 1864, the Chief Clerk made his certificate that the real estate was worth about £350 per annum. On the 2nd of March, 1864, an order was made for the appointment of a guardian and receiver, and allowing a sum of £220 per annum for the maintenance of the Plaintiff and the Defendants. On the 10th of August, 1866, Mr. *J.*, the solicitor, died. On the 14th of October, 1867, the infant Plaintiff attained twenty-one years of age. In November, 1867, he disentailed the real estate (of which he was tenant in tail under his grandfather's will). In June, 1868, he obtained an order to discharge the receiver; and on the 10th of February, 1872, procured an order to change his solicitor. On a petition presented under the 22 & 23 Vict. c. 127, by the personal representative of the solicitor, to establish a charge on the real estate for *J.'s* costs:—

Held, that the suit was properly instituted, and the solicitor duly "employed" on behalf of the infant; that the property was "preserved" in the suit for the benefit of the infant through the instrumentality of the solicitor; that the infant had, on attaining twenty-one, adopted the suit; that the *Statute of Limitations* was not a bar to the claim; that the personal representative of the solicitor could present the petition; and that an order must be made upon it.

PETITION.

George Baile, by his will, dated the 15th of November, 1828, devised and bequeathed certain freeholds and leaseholds in *Wales* to his son *William Baile* for life, with remainder to his first and and other sons in tail, with remainder to his daughters in tail, with divers remainders over; and bequeathed the residue of his personal estate to trustees upon trust (in the events which happened) for his son absolutely. The testator made two codicils, dated respectively the 2nd of May, 1829, and the 23rd of October, 1829, by each of which he devised other freeholds to the trustees of his will upon trusts similar to the limitations in the will. The

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testator died on the 11th of November, 1831, leaving *William Baile* his only child and heir-at-law, then an infant of seven years of age. In 1833 a suit was instituted for the administration of the testator's estates, in the course of which the rents and profits of the real estate were duly accumulated, and such accumulation was paid to *William Baile* on his attaining the age of twenty-one years. He married, survived his wife, and died intestate in April, 1863, leaving seven children, all then infants. The Plaintiff, *William George Baile*, was his heir-at-law and tenant in tail of the freeholds devised by the testator's will and codicils. *William Baile* did not appoint any guardian to his children.

The bill in the suit of *Baile* v. *Baile* was filed on the 15th of June, 1863, by *Mary Jones*, the Plaintiff's maternal grandmother, as his next friend; and it prayed for the appointment of a guardian to the Plaintiff and his brothers and sisters (the Defendants), or to the Plaintiff; for directions as to the maintenance and education of the Plaintiff during his minority, having regard to the circumstances of the Defendants; for the necessary and proper accounts and directions in the suit; and for a receiver of the rents and profits of the hereditaments and premises to which the Plaintiff was entitled under the will and codicils during his minority.

Mr. *John Budden Jeffries* then acted as the solicitor for Mrs. *Mary Jones*, the next friend of the Plaintiff.

On the 4th of July, 1863, a decree was made by which inquiries were directed as to the children of *William Baile*, and the real estate devised by the will and codicils of the testator, and the rents and profits thereof accrued since the death of *William Baile*; and it was ordered that a receiver thereof should be appointed, together with a guardian of the Plaintiff and his brothers and sisters.

On the 6th of February, 1864, the Chief Clerk made his certificate as to the ages of the children, and stated (*inter alia*) that the gross annual value of the testator's real estate was £349 12*s*.

On the 22nd of March, 1864, by an order made in the suit, on the application of the Plaintiff, the sum of £220 per annum was allowed for the maintenance and education of the children; and the Rev. *D. Jones* was appointed their guardian, and receiver of the real and personal estates of the testator.

On the 10th of August, 1866, Mr. *John Budden Jeffries* died, having, by his will, appointed his widow his executrix, who duly proved his will.

On the 14th of October, 1867, the Plaintiff attained his age of twenty-one years.

By an indenture duly inrolled, dated the 20th of November, 1867, and made between the Plaintiff, of the one part, and *Mary Jones*, his next friend in the suit, of the other part, the Plaintiff, in consideration of natural love and affection, granted to her and her heirs a portion of the real estate devised by the will of the testator, and worth £131 1*s.* per annum, to hold the same freed and discharged from the estate in tail of the Plaintiff, and the remainders expectant thereon to the use of *Mary Jones*, her executors, administrators, and assigns, for ten years from the date of that indenture, upon the trusts thereinafter declared, and subject thereto, to the use of the Plaintiff, his heirs and assigns. The trusts of the ten years' term were for the maintenance of the brothers and sisters of the Plaintiff; and the indenture contained a power for *Mary Jones* to lease and give receipts.

All the real estate devised by the will of the testator, other than that comprised in that indenture, had been sold by the Plaintiff to purchasers; without, as it was alleged, notice of the claim hereinafter mentioned.

On the 25th of June, 1868, an order was made, on the application of the Plaintiff, for discharging the receiver, and for the passing of his final accounts. Messrs. *Vizard & Co.* acted as the solicitors on this application. The accounts had not yet been passed; but it was stated at the Bar that there had always been a balance, although sometimes a small one, in favour of the receiver.

The widow of Mr. *John Budden Jeffries* presented a petition on the 10th of January, 1872, stating the facts as above set forth, and also as follows:—

"Mr. *John Budden Jeffries* was employed, by and acted as the solicitor of, *Mary Jones*, the next friend of the Plaintiff in the suit of *Baile* v. *Baile*, to prosecute it; and, as such solicitor, he, until his death, prosecuted and conducted the suit and procured the decree, and such of the orders hereinbefore stated as were made during his life, to be made and pronounced; and by means of

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such decree and orders the real estate of the testator was preserved for the benefit of the Plaintiff and those claiming under him.

"Mr. *John Budden Jeffries* became entitled to receive and be paid certain costs, charges, and expenses of and in relation to the suit, which costs, charges, and expenses had never been taxed, and no part thereof had ever been paid; and at the death of Mr. *John Budden Jeffries* such costs, charges, and expenses were due to him; and the same were then due to his estate.

"The indenture of the 20th of November, 1867, was executed without any valuable consideration; and at the time of the execution thereof all the parties thereto had notice that Mr. *John Budden Jeffries* had been employed to prosecute the suit, and that the property comprised in the indenture had been preserved by his instrumentality."

The Petition then prayed a declaration that Mr. *John Budden Jeffries* had been, and that the Petitioner, as his personal representative, was, entitled to a charge upon the property comprised in the indenture of the 20th of November, 1867, for the taxed costs, charges, and expenses of or in reference to the suit of *Baile* v. *Baile;* and that those costs, charges and expenses, and also the costs of the Petitioner of and incident to that application might be taxed as between solicitor and client; and that the amount of such costs, charges, and expenses, when taxed, might be raised and paid to the Petitioner as the personal representative of Mr. *John Budden Jeffries,* by sale or mortgage of the property, or of a competent part thereof.

On the 10th of February, 1872, the Plaintiff obtained an order to change his solicitor in the suit, by appointing Mr. *John Williams* as such solicitor, in the place of Mr. *John Budden Jeffries.* Messrs. *Dobinson & Geare* were then appointed agents for him, in the place of Messrs. *Vizard & Anstie.*

Mr. *Lindley,* Q.C., and Mr. *Freeling,* for the Petitioner:—

The question in this case depends on the construction of the 23 & 24 Vict. c. 127, s. 28.

That section provides that in every case in "which an attorney or solicitor shall be employed to prosecute or defend any suit, matter, or proceeding, in any Court, it shall be lawful for the Court to

declare such attorney or solicitor entitled to a charge upon the property recovered or preserved; and upon such declaration being made, such attorney or solicitor shall have a charge upon and against, and a right to payment out of, the property, of whatsoever nature, tenure, or kind the same may be, which shall have been recovered or preserved through the instrumentality of any such attorney or solicitor, for the taxed costs, charges, and expenses of or in reference to such suit, matter, or proceeding." Pausing there, it seems plain that if we were now seeking only to establish a lien against personal estate, we should have no difficulty. But this is a case of real estate: *Morgan & Davey* on Costs (1). *Bonser* v. *Bradshaw* (2) is no authority against us, because, although the Court in the first instance declined to make a declaration of charge on an infant's property, it did so afterwards, when he had attained twenty-one: *Bonser* v. *Bradshaw* (3).

The VICE-CHANCELLOR asked whether that case was argued on behalf of the infant, before Sir *John Stuart*, on the second application to him.

Mr. *R. W. E. Forster* (*amicus curiæ*) said he thought it was not.

Mr. *Lindley*:—But this Plaintiff appears on the Petition, which removes all difficulty on that head.

Then we come to these questions:—

1. Was this property "recovered or preserved" in this suit through the instrumentality of Mr. *Jeffries*?

2. Did the Plaintiff adopt the suit on attaining his majority?

3. Is the disentailing deed of November, 1867, a bar to the Petitioner's claim?

As to the first question. It is impossible to say the property was recovered, because it was throughout that of the Plaintiff; but "preserved" it certainly was within the words of the Act. It was necessary, and for the infant Plaintiff's benefit, to obtain the appointment of a receiver, because, in the absence of one, there was no proper hand to receive the rents and profits of the estate,

(1) Page 249.
(2) 30 L. J. (Ch.) 159; S. C. on a second hearing, 4 Giff. 260.
(3) 9 Jur. (N. S.) 1048. 4 Giff 260
(2 S C 7 Jur N S. 231.

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and they might have been lost. A receiver and guardian was therefore appointed by an order procured by Mr. *Jeffries*; and the rents were saved and applied for the maintenance of the family, and in keeping up and repairing the property.

In *Wilson* v. *Round* (1) a solicitor obtained a foreclosure decree for a client. The client afterwards died, and a decree for the administration of his estate was made. The Court under this section made a charging order for the costs of the suit against the real estate of the client.

In *Scholefield* v. *Lockwood* (2) the Master of the Rolls said the interest in that case was clearly not recovered, but he thought it might fairly be said to have been "preserved." The Act was intended to be construed liberally; and solicitors ought not to be deprived of their lien in matters where there had been a good deal of work done.

In *Twynam* v. *Porter* (3) a receiver was appointed, and it was held that the property was "effectually preserved."

In re Keane (4) was, no doubt, a very special case; but it illustrates the principle for which we contend.

But in *Bailey* v. *Birchall* (5) the solicitor was held entitled under the Act to a charge on the property recovered or preserved irrespective of his client's interest in it, and although it turned out that the latter had not any interest in it. That is a case which goes further than it is necessary for us to place this one.

[They also cited *The Phillipine* (6) as to the word "preserved."]

Then as to the second question: We say that the Plaintiff not only did not repudiate the suit on coming of age, but he really adopted it. He attained his majority in October, 1867, and in November of the same year he executed a deed, to which *Mary Jones*, "the next friend of the Plaintiff in this suit," was a party. By that deed he disentailed the very property "preserved" in this suit. In 1868 he obtained an order to discharge the receiver, and in February last (since the presentation of this Petition) he obtained another order to change his solicitor. It is plain, therefore, that he has adopted the suit.

(1) 4 Giff. 416. 10 Jur N.S. 34
(2) Law Rep. 7 Eq. 83–87.
(3) Ibid. 11 Eq. 181.
(4) Law Rep. 12 Eq. 115.
(5) 2 H. & M. 371. 11 Jur N.S. 57
(6) Law Rep. 1 A. & E. 309.

As to the third question: The deed of 1867, was purely voluntary, and not, therefore, of any statutory or other force as against the Petitioner's claim.

[They then cited 23 & 24 Vict. c. 127, s. 28 (*ad finem*), and *Bonser* v. *Bradshaw* (1); and, as to the practice with reference to an infant Plaintiff's getting rid of his next friend, *Daniell's* Chancery Practice (2).]

Mr. *Greene*, Q.C., and Mr. *Murray Browne*, for the Plaintiff:—

This Petition is not within the statute.

Bonser v. *Bradshaw* expressly decides that the 28th section of this statute does not apply to the case of an infant Plaintiff; and that decision has not been overruled.

The section itself says, "in every case in which an attorney or solicitor shall be 'employed,'" &c. Here the solicitor was not employed by the infant Plaintiff at all, but by his next friend. An infant cannot enter into a binding contract of retainer with a solicitor; and it is only when the solicitor is retained by a person capable of contracting with him for the prosecution or defence of any suit, matter, or proceeding, and when, being so retained, he recovers or preserves any property for his client, that he is entitled to the statutory charge on that property. Even where a solicitor, employed by some one person who can employ him, recovers or preserves the property for another, there is not such an employment as will bring the case within the statute. But the present is a stronger case than that. There is a distinction between the case of a married woman and an infant. The latter is absolutely disqualified from employing a solicitor so as to bind himself; the former, where she has separate estate, is not. Here there was no "employment" of the solicitor within the Act.

But supposing for a moment that there was a sufficient employment of the solicitor in this case, the property must "be recovered or preserved through his instrumentality" before he can have the declaration of charge on it. It is admitted that this property, being always the Plaintiff's, was not "recovered" for him. But it is said it was "preserved." Why? It never was in any danger; no one threatened it; there were no adverse

(1) 7 Jur. (N. S.) 231. (2) Page 73, Ed. 1871.

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claims to it; no one was in any possession or *quasi* possession of it that could lead any one to suppose it might be lost; and it is now equally in the position it would have been in if no suit had been instituted with respect to it. Assuming, however (but for the sake of argument only), that it was preserved, for whom was it preserved? For the brothers and sisters of the Plaintiff; not for the Plaintiff himself. And therefore, also, there was no due preservation of the property, so as to make it chargeable under the statute. So far from the Plaintiff acquiring any additional benefit from the suit, his interests really suffered from it, because the whole object of it was to provide maintenance for the family generally out of what was absolutely his own property. In truth, this suit was altogether unnecessary; the limitations of the property by the will were all legal; no receiver was wanted; and a simple summons presented in Chambers would have secured all that was actually required.

In *Wilson* v. *Round* (1), *Scholefield* v. *Lockwood* (2), *Twynam* v. *Porter* (3), and *In re Keane* (4), something was either recovered or preserved for the client by the solicitor.

Then, can it be said that the Plaintiff has adopted the suit? Certainly not. He procured the order to discharge the receiver in 1868, after he had attained twenty-one. But that was to get rid of the suit; for it was the only way in which he could put himself, though the full legal owner of the estate, into the receipt of the rents and profits of it. To say that a step taken by a man to free himself from a Chancery suit is an adoption of it, is somewhat startling. So the argument founded on the order to change his solicitor, obtained since this Petition was presented, falls with the other. All that the new solicitor was required for was to carry out the previous intention of getting rid of the suit.

Then as to the *Statute of Limitations*:

The last order that was obtained through the instrumentality of the solicitor in this suit was on the 22nd of March, 1864. His right to sue for the costs now in question then accrued when he had done all that, as such solicitor, he could do. He died on the 10th of August, 1866. This Petition was not presented till the

(1) 4 Giff. 416. 10 Jur. N.S. 34
(2) Law Rep. 7 Eq. 83.
(3) Law Rep. 11 Eq. 181.
(4) Ibid. 12 Eq. 115.

10th of January, 1872. If this were a case of personalty, no lien could now be set up in respect of these costs; and no charge can now, therefore, be declared for them under the statute. It is true that there was, in 1868, an order to discharge the receiver, shewing that the suit was then pending. But the solicitor was dead at that time, and his representative can claim no benefit from that. Moreover, a solicitor's bill of costs is barred by the statute unless a continuing retainer can be shewn; which, in this case, is *ex necessitate* impossible; at all events, after 1864: *Rothery* v. *Munnings* (1).

But supposing it is open to the Petitioner to contend that the *Statute of Limitations* only began to run against her claim from her husband's death in 1866 (and not from 1864, as we say), because till his death, there was a continuing retainer, still a lapse of five years and a half has intervened between that time and the presentation of this Petition. There has, therefore, been great laches on her part; the effect of which is in no way removed by the continuance of the suit. Moreover, the order of 1868 really added to the already (as we say) improperly incurred costs of the proceedings. On all these grounds we submit that this Petition is wrongly presented, and must be dismissed with costs.

[They also referred to *Shaw* v. *Neale* (2).]

Mr. *Morgan*, Q.C., and Mr. *Badcock*, for the Defendants, and also for a purchaser:—

Re Hooper (3), was a case of the costs of a solicitor who had acted for a married woman; but it shews that a suit of this kind must be *bonâ fide*.

Then, further, the Court cannot in this case decide in favour of the Petitioner without overruling *Bonser* v. *Bradshaw* (4). On the appeal in that case, the Lords Justices thought the infant was not sufficiently represented. He did not appear on the further hearing before the Vice-Chancellor, and there was no argument. If he had appeared and consented then, any order could, of course, have been made. The Vice-Chancellor seems to have thought that there was a lien; but *Shaw* v. *Neale* settles the question whether a solicitor's lien attaches upon real estate.

(1) 1 B. & Ad. 15.
(2) 6 H. L. C. 581.
(3) 2 D. J. & S. 91.
(4) 10 W. R. 481.

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The last item of work done by this solicitor was obtaining the order of 1864, and by analogy, from the principle of *Ex parte Turner* (1), the *Statute of Limitations* is clearly a bar to this claim.

Then the Petitioner is only the legal personal representative of Mr. *Jeffries*.

By the 2 Geo. 2, c. 23, certain rights were secured and remedies given to solicitors, but only to them personally. Those remedies were, for certain purposes, extended to their executors and administrators by 7 Will. 4, c. 12; but by the 6 & 7 Vict. c. 73, the whole of 2 Geo. 2, c. 23, and part of 7 Will. 4, c. 12, were repealed: *Maddeford* v. *Austwick* (2). There is no reason here why this Act of 23 & 24 Vict. c. 127, s. 28, should be extended to the legal personal representatives of a solicitor: *Williams* v. *Griffith* (3). 6 & 7 Vict. c. 73 (4), applies to this case; and until the Legislature passes another statute extending the right to present a petition of this kind, now possessed by a solicitor, to his legal personal representatives—either executors or administrators—they cannot do so.

Further, we say there is no right to a charge on real estate till the Court has made a declaration. The statute is express as to that. Sect. 28 says: "All conveyances and acts done to defeat or which shall operate to defeat, such charge or right shall, unless made to a *bonâ fide* purchaser for value without notice, be absolutely void and of no effect as against such charge or right."

You cannot defeat a charge before it exists, and the words do not apply where you have a conveyance of the property (here we have a disentailing deed) before the declaration is made. In such case you can have no declaration; and if no declaration, no charge.

The VICE-CHANCELLOR:—Do I understand you to say that the words of the statute extend only to the nullification of any conveyance made after the declaration of charge?

Mr. *Morgan*:—Yes: *Twynam* v. *Porter* (5). And if a solicitor

(1) 30 L. J. (Ch.) 29.
(2) 3 My. & Cr. 423–425.
(3) 10 M. & W. 125.
(4) Dan. Ch. Pr. ed. 1871, ch. xliv. s. 1. pp. 1712, *et seq.*
(5) Law Rep. 11 Eq. 181.

does not get his charge under the statute, he does not get it against real estate at all: *Shaw* v. *Neale* (1). It may be different with respect to his lien on personal estate.

Feb. 17. SIR JOHN WICKENS, V.C.:—

The enactment under which this Petition is presented (23 & 24 Vict. c. 127, s. 28,) applies only to solicitors "employed" to conduct suits, matters, or proceedings. The word "employed" must have all reasonable weight given to it; but to say that it does not apply to a solicitor employed in good faith by a next friend on behalf of an infant who, when he comes of age, adopts the proceedings, seems to me a narrow construction of it.

Further, if a solicitor institutes proceedings on behalf of an infant, and dies during the infancy, and the proceedings are continued by a second solicitor till majority, and then adopted by the infant, I think that the first solicitor, as well as the latter, must be considered as "employed" within the Act.

Therefore it seems to me reasonable to hold, that though an infant's estate is subject to no lien in respect of proceedings which he repudiates when he comes of age, his position, if he then adopts the proceedings, is in this, as in other respects, the same as if he had been an adult, and originated the proceedings himself. This is strictly in accordance with what was done in *Bonser* v. *Bradshaw*, and affords, in fact, the only ground on which all that was done in that case can be supported.

The first question, therefore, in this case is, whether the Plaintiff adopted the proceedings. I think that he did. Of course, the proceedings, being confined to the preservation of the property during his infancy, dropped when he came of age. But he applied to discharge the receiver, and that he should pass his accounts, and intended, no doubt, to receive any balance which might be due. If he had actually received such a balance, it would have been a clear adoption. The fact that (so far as is known) none is due can hardly affect the result; especially as it arises from the Court having granted him maintenance to a large amount. No doubt it

(1) 6 H. L. C. 581.

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is somewhat hard to say that an infant adopts the suit because, instead of applying for leave to eject the receiver, and to institute proceedings against him as volunteer bailiff, he takes the natural and equivalent course of applying for possession and for the receiver's discharge. But, on the other hand, an infant, whose estate has been managed and protected by means of the proceedings, and who by means of them has been maintained and educated, is not morally justified in repudiating them when he comes of age, and must be held to have adopted them, if he has done anything which can reasonably be considered an adoption.

A singular argument put forward in this case must be noticed here. It was suggested that the Plaintiff was morally justified in repudiating the suit, because the large allowance for maintenance was intended to support his brothers and sisters, who were wholly unprovided for. But the order could only have been founded on the Court's opinion that it was for the infant's benefit that his brothers and sisters should not starve; and I must take what went to maintain them as expended on him, no less than what went to buy his own clothes or pay his own schooling.

I think, therefore, that this case is within the Act, if the property was "recovered" or "preserved." "Recovered" it certainly was not. But was it not "preserved"? The rents were preserved and applied to the infant's maintenance, or in payment of repairs and outgoings, and the estate was preserved; not, indeed, in the same sense in which an estate is preserved against an adverse claimant; nor even, perhaps, in the sense in which an estate is preserved, by keeping a sea-wall in repair; but in the sense in which property is preserved, which is managed and retained for the rightful owner, instead of being left to the first comer. There is no case, perhaps, in which the word "preserved" in this Act has had this large meaning given to it. But I agree with the Master of the Rolls and other Judges, that the Act should be liberally construed; and so construing it, I hold that this property was "preserved."

Then it was said that these proceedings were unnecessarily expensive; that a bill was not required; and the like. That there was anything like wanton extravagance or any undue inclination to multiply costs on the part of the next friend (the infant's

maternal grandmother), is not even suggested; and it must be remembered that she was the proper person to interfere for the infant. I am therefore glad to be able to hold that the infant's adoption of the proceedings prevents him from now objecting to what was actually done.

Further, the *Statute of Limitations* is pleaded; certainly, in one of the very last cases in which one would have expected such a plea. I think that the statute would not run while the proceedings were going on with Mr. *Jeffries* on the record as the Plaintiff's solicitor, and the receiver in possession; though, as a matter of fact, the solicitor took no step within six years of the present time. This seems to me the true conclusion on principle, and in conformity with *Harris* v. *Quine* (1). If so, the statute did not begin to run till the death of Mr. *Jeffries* in August, 1866, and the plea fails.

Further, it is said the right is personal to the solicitor, and is not extended to his personal representatives. I should have thought that argument a very strong one if the law had now been in the same state as it was before the 6 & 7 Vict. c. 73; because the right to a lien might well have been held under that statute correlative to the liability to taxation. But the law is altered, and the argument seems to me unfounded.

Lastly, it is said that a voluntary conveyance before the charge is declared defeats it. I cannot so read the statute. To do so appears to me inconsistent with the true construction of it, and with the authorities.

It occurred to me during the arguments that the Petitioner was bound to shew the incapacity of the next friend to pay, or, at least, an attempt to make her pay, these costs before coming to assert the charge in respect of them. But if the Plaintiff has adopted the proceedings the next friend has become a mere surety; and it cannot lie in his mouth to say that the remedies against her should be first exhausted.

The Plaintiff was tenant in tail in possession, and disentailed the property when he came of age, for the purpose of making a voluntary settlement. This may or may not have let in the Petitioner's claim as a charge on the fee simple; but whether it did or

(1) Law Rep. 4 Q. B. 653.

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not is immaterial for the purpose of the order I have now to make; though of course it might, under certain circumstances, become important. I make the usual order.

Solicitors for the Petitioner: Messrs. *Vizard & Co.*

Solicitors for the Plaintiff and Defendant: Messrs. *Dobinson & Geare,* agents for Mr. *John Williams, Brecon.*

HAMILTON *v.* HECTOR.

M. R.
1872
Feb. 28; March 1, 4.

[1871 H. 152.]

Separation Deed—Custody of Children—Lawful Agreement—Specific Performance—Covenant to deliver up Private Documents—Making and Retaining Copies.

The Court will enforce a legal and proper covenant in a separation deed although other covenants in the same deed may be illegal.

By a separation deed, made after the wife had instituted proceedings in the Divorce Court for divorce and the custody of her children, the husband covenanted to deliver up forthwith to his wife all her journals, diaries, and private correspondence and memoranda; that the elder two children of the marriage should remain at such schools in *England* as the husband, or such schools elsewhere as the husband, with the consent of the wife, should direct; that the husband and wife should each have access to them at all reasonable and convenient times, subject to the regulations of the schools; and that their holidays should be passed by them at such places and in such manner as the trustees of the deed should direct; and that the younger two children (who were respectively under the age of seven years) should remain in the custody of the wife:—

Held, that the husband was not entitled to make or retain copies of the journals, diaries, and memoranda covenanted to be delivered up:

Held, also, that having regard to the evidence with respect to the husband's misconduct, the covenants with respect to the holidays of the elder two children were reasonable and proper, and would be enforced by the Court, even if the covenant as to the custody of the younger children were not legal, as to which however the Court expressed no opinion.

Vansittart v. *Vansittart* (1), and *Swift* v. *Swift* (2) considered.

ANNE HECTOR, one of the Plaintiffs in this case, was, in 1858, married to the Defendant *Alexander Hector*, and there was issue of the marriage four children, of whom the younger two were under seven years of age. In October, 1870, *Anne Hector* gave instructions to her solicitors to present a petition in the Divorce Court, first for a judicial separation, and afterwards for a divorce, from *Alexander Hector;* the draft of such petition was prepared and signed by counsel; and the prayer thereof, as finally settled, was for a divorce and the custody of the children of the marriage. She also filed a bill in Chancery against her husband

(1) 4 K. & J. 62; 2 De G. & J. 249. (2) 34 Beav. 266; 34 L. J. (Ch.) 394.

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to set aside a certain appointment, as having been obtained from her by undue influence. After some negotiation between the parties they agreed to live separately, and a separation deed was executed by them. This deed bore date the 10th of December, 1870, and was made between *Alexander Hector* of the first part, *Anne Hector* of the second part, and *A. Hamilton* and *F. Jones*, as trustees, of the third part, and contained covenants by *Alexander Hector* (amongst others) that *Anne Hector* might thereafter live separate from him, and that he would not seek to enter her residence, except with the written authority of the trustees, for the purpose of seeing either of the children; and that he would, upon the execution thereof, deliver over to her, or as she should direct (amongst other things), all her journals, diaries, and private correspondence and memoranda for her own absolute use and benefit. The deed contained covenants as to the property of the husband and wife; and also covenants that the elder two children should, subject to such powers as were conferred upon the trustees, remain in such schools in *England* as *Alexander Hector*, or such schools elsewhere as *Alexander Hector*, with the consent of *Anne Hector*, should from time to time direct; and that each of them should from time to time have all reasonable access to and communication with the said children, subject, nevertheless, to the ordinary regulations of the respective schools; and that the holidays of the children should be passed by them at such places and in such manner as the said trustees should from time to time direct, having regard, as far as practicable, to the wishes of each of them the said *Alexander Hector* and *Anne Hector;* and also that the younger two children should remain in the custody or under the control or charge of *Anne Hector* so long as the trustees should think proper, but that *Alexander Hector* should from time to time, but at convenient and reasonable times, have access and communication with them: Provided always, that if any disputes should arise between them as to the times and manner in which *Anne Hector* should have communication with the elder two children, then such disputes should be settled by the trustees: and further, that it should be lawful for the trustees, if any circumstances should arise which in their opinion rendered it absolutely necessary for the welfare and interest of the children that the elder

two children should be removed from the custody or control of *Alexander Hector*, or the younger two children from the custody, control, or charge of *Anne Hector*, or from the school at which they might be, to remove any of the four children accordingly, and to place the child so removed under such control, custody, or charge, or at such school as the trustees might think fit; but they were not to exercise this power as regards the elder two children unless *Alexander Hector* should become incapable or unfit to manage his own affairs. And it was agreed that the bill in Chancery should be dismissed, and that *Anne Hector* should not institute proceedings for a judicial separation or divorce so long as she lived separate from *Alexander Hector;* and that the trustees should indemnify *Alexander Hector* against the debts and engagements of *Anne Hector*.

The elder two children (a son and a daughter) were placed in schools chosen by *Alexander Hector*. *Alexander Hector* gave directions that these children should not be allowed to see or communicate with *Anne Hector* except (as to his daughter) in the presence of a third person. He also refused to allow them to pass any part of the holidays at Christmas, 1870, with *Anne Hector;* and the following Easter holidays were passed by the children with *Alexander Hector*. In April, 1871, the solicitors of the trustees applied to the solicitors of *Alexander Hector*, asking for a definite arrangement as to the Midsummer holidays. Another letter was sent in May; but no answer was returned to either letter. On the 26th of May the trustees sent notice to *Alexander Hector* that they directed that the first four weeks of the children's coming Midsummer holidays should be passed with Mrs. *Hector* and the rest with Mr. *Hector*. On the 13th of June the bill in this suit was filed by *Anne Hector* and the trustees of the deed of separation, and by the four children, against *Alexander Hector*, praying that the trusts of the deed might be carried into effect, that *Alexander Hector* might be ordered to deliver up to the Plaintiff *Anne Hector* all articles covenanted to be delivered up by him, and for an injunction to restrain him, first, from preventing *Anne Hector* from having access to or communication with her elder two children, or either of them, at their respective schools, subject only to the regulations mentioned in the deed of separation; and, secondly,

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from preventing the elder two children, or either of them, from passing the first month of the Midsummer holidays, 1871, with their mother, as directed by the terms of the notice of the 26th of May, 1871, and from passing their future holidays otherwise than as the trustees should direct, pursuant to the power in that behalf contained in the deed.

The Plaintiffs moved, before the Master of the Rolls, for an injunction to restrain *Alexander Hector* from preventing the elder two children from spending the holidays at Midsummer, 1871, in accordance with the direction of the trustees. Upon the hearing of this motion the Plaintiffs relied entirely on the deed of separation, and adduced no evidence of any misconduct on the part of *Alexander Hector;* and the Master of the Rolls refused the motion. The Plaintiffs then appealed to the Lord Chancellor; and, upon the hearing of the appeal motion, adduced evidence to shew that *Alexander Hector* had been guilty of cruelty towards *Anne Hector*, and had also committed adultery with a person who, as was alleged, had, during the Easter holidays, 1871, spent a great part of almost every day with him and his elder two children.

The Lord Chancellor was of opinion that the charge of cruelty was proved, and that the evidence as to the adultery was strong but not conclusive; and he granted an interim injunction. The case is reported (1).

Subsequently to the institution of the suit, *Alexander Hector* delivered up to *Anne Hector* all the articles covenanted by him to be delivered up to her, including her journals, diaries, and private memoranda; but he retained, and insisted on his right to retain, in his possession copies of the diaries and memoranda which he had caused to be made.

After the appeal motion was heard, the trustees caused *Alexander Hector* to be served with a notice, directing that, until further directions should be given, the elder two children should spend the first half of their respective holidays with their mother, and the last half thereof with the father.

The bill was subsequently amended, and, as amended, contained a prayer that the Defendant *Alexander Hector* might be desired to deliver up to *Anne Hector* all copies of her journals, diaries, and

(1) Law Rep. 6 Ch. 701.

private memoranda made by him or by his order, or for his use; that it might be declared that the provisions contained in the deed of separation relating to the children and their holidays were binding on the Defendant, and that the aforesaid directions given by the trustees were reasonable and proper, and ought to be observed; and that the Defendant might be restrained from preventing the elder two children, or either of them, from passing their future holidays otherwise than as the trustees had directed by their aforesaid second notice.

The cause now came on to be heard on the same evidence as had been adduced on the hearing of the appeal motion.

Mr. *Lindley*, Q.C., and Mr. *Cookson*, for the Plaintiffs:—

The younger children of Mr. and Mrs. *Hector* are still under seven years of age; and no question has arisen or now arises respecting the custody of them. The provisions of the deed of separation now sought to be enforced relate, not to the custody of the elder children, but to the access of their mother to them. We ask a decree which will compel the Defendant to permit these two children to spend their holidays in accordance with the directions given by the trustees until further order—in other words, to enforce a reasonable covenant entered into by the Defendant.

The validity of separation deeds is clearly established by *Wilson* v. *Wilson* (1). In *Swift* v. *Swift* (2) a husband, who was proved to be unfit to be entrusted with the custody of children, was restrained from interfering with them contrary to the terms of a covenant contained in a separation deed. The case which will be relied on against us is that of *Vansittart* v. *Vansittart* (3). That was a suit for specific performance of an agreement to execute a separation deed, the general scheme of which was intended to be that the husband should get rid of his children, and that the wife should acquire rights over them, which, as the law then stood, could not be acquired by divorce proceedings. But in the present case the object of the suit is, not to compel the execution of a deed, but to enforce one which has been executed. Moreover, the provisions of

(1) 14 Sim. 405; 1 H. L. C. 538; 5 Ibid. 40.

(2) 34 Beav. 266; 34 L. J. (Ch.) 394.

(3) 4 K. & J. 62; 2 De G. & J. 249.

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the deed in this case are very different from that contemplated in *Vansittart* v. *Vansittart*. As regards the elder two children, the only stipulations affecting the control of the husband are the provision that the consent of the wife is to be given before they are sent to school abroad, and the provision as to the holidays. As regards the younger children, the deed goes further, and binds the father to allow them to remain with the mother. Now *Swift* v. *Swift* shews that if, under the circumstances, the provisions of a separation deed are proper, the Court will enforce them without reference to its jurisdiction over wards of Court. Here it is shewn that the children have been brought into contact with an improper person, a circumstance which alone is sufficient to warrant the interference of the Court: *Creuze* v. *Hunter* (1). The effect of the children living in the same house with such a person is not only calculated to injure them morally, but renders it impossible for the mother to visit them there. There is therefore good ground for the interference of the Court as regards the elder children. The stipulations as regards the younger children would not, even if illegal, invalidate or prevent the Court from giving effect to stipulations which are otherwise unobjectionable: *Vansittart* v. *Vansittart* (2); *Lumley* v. *Wagner* (3); but we say that they are perfectly justified: *Gibbs* v. *Harding* (4). The wife had instituted proceedings in the Divorce Court to obtain a divorce *à vinculo* and the custody of her children; and her evidence shews that there was good ground for supposing that those proceedings would be successful. Now, under *Talfourd's Act*, the wife would, in such a case, have obtained the custody of the children until they were seven years of age, and after that would have been entitled to access to them. The Divorce Acts, 20 & 21 Vict. c. 85, s. 35, and 22 & 23 Vict. c. 61, s. 4 (which have been passed since the decision in *Vansittart* v. *Vansittart*), enable the Divorce Court to do what is just and right with reference to the custody of the children; and the power so conferred has been construed in the widest sense: *Marsh* v. *Marsh* (5); *Mallinson* v. *Mallinson* (6); *Chetwynd* v.

(1) 2 Cox, 242.
(2) 2 De G. & J. 255.
(3) 1 D. M. & G. 604.
(4) Law Rep. 5 Ch. 336.
(5) 1 Sw. & Tr. 312; 28 L. J. (P. & M.) 13.
(6) Law Rep. 1 P. & D. 221.

Chetwynd (1). Having regard to the orders made by the Divorce Court in these cases, and to the facts proved in the present case, it cannot be said that the stipulations of the deed with respect to the younger children are contrary to public policy. Nay, further, the Court would give effect to them, if it were necessary to do so, provided it were shewn that they were still reasonable and proper. Some objection may be taken to the fact that the trustees have power in certain cases to give directions with respect to the custody of the children; but their power is exerciseable as regards the elder children only in the event of Mr. *Hector* becoming incapable to manage his affairs; as regards the younger children, it operates against the mother, and ought not to be complained of by the father. Besides, the Court will not assume that capricious orders will be made by the trustees, which, if inserted in the deed, would make it bad.

In *Hope* v. *Hope* (2) the Court refused to enforce an agreement, because it was intended to facilitate a divorce, and was therefore in derogation of the marriage contract. But in the present case the deed is like that in *Rowley* v. *Rowley* (3); it is intended to put an end to a divorce suit, and to keep up the contract instead of annulling it.

Then, as to the copies of the diaries and memoranda which the Defendant refuses to give up, it is clearly contrary to the meaning and good faith of the covenant that he should give up the originals and retain copies. These copies may be used for the purpose of giving annoyance to Mrs. *Hector* as much as the originals.

Sir *R. Baggallay*, Q.C., Mr. *Miller*, Q.C., and Mr. *E. Harvey*, for the Defendant:—

There is no doubt that the Court will have regard to the benefit of infants; but there is a great distinction between acting purely for the benefit of infants and enforcing a contract which the Plaintiff thinks is for their benefit. We admit that the Court will give effect to agreements for separation, provided they contain nothing improper, illegal, or contrary to public policy; but *Vansittart* v. *Vansittart* (4) shews that if the agreement contains a single

(1) Law Rep. 1 P. & D. 39.
(2) 8 D. M. & G. 731.
(3) Law Rep. 1 H. L., Sc. 63.
(4) 4 K. & J. 62; 2 De. G. & J. 249.

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stipulation contrary to law, the Court will not enforce it at all, however proper it may be in other respects. It is said that that was a suit for specific performance; here the suit is for administration of the trusts of the deed. What difference can there be in principle between the two cases? Why should the Court carry out the trusts of an executed deed, when it would not direct the execution of it? *Swift* v. *Swift* (1), which is much relied on by the Plaintiffs, was a very special case; the father had so misconducted himself as to be unfit to be entrusted with the custody of the child; and independently of the deed, the Court would have taken away the custody from him; here that is not even asked.

The deed consists entirely of covenants; the consideration for the covenants on one side being the covenants on the other. If any one of these covenants is illegal that will vitiate the whole consideration: *Batty* v. *Chester* (2). Here the covenants that Mrs. *Hector* will not prosecute a suit for judicial separation or divorce, and as to the custody of the children, are clearly illegal; the effect of the latter being to deprive the father of all voice in the education of the children. In *Lumley* v. *Wagner* (3), it is true that the Court enforced one stipulation of an agreement which it could not enforce as a whole; but the impossibility of enforcing it as a whole arose from the inherent nature of the subject matter, and not from any illegality in its provisions; therefore that case does not apply here. *Blackett* v. *Bates* (4) shews that you cannot enforce an agreement against a Defendant, where it contains stipulations that could not be enforced against the Plaintiff. The Court would not restrain the Plaintiff *Anne Hector* from taking proceedings in the Divorce Court, if she had a proper case.

Then, as to the copies of the diaries, there is not a word in the deed to prevent the husband from making and keeping such copies; all he covenants to do is to deliver up the originals; and that he has done.

Mr. *Lindley*, in reply:—

The decision of the Lord Chancellor on the appeal motion shews that, in his opinion, the covenants as to the elder two

(1) 34 Beav. 266; 34 L. J. (Ch.) 394.
(2) 5 Beav. 103.
(3) 1 D. M. & G. 604.
(4) Law Rep. 1 Ch. 117.

11 W. R. 11 Jur. N. S. 148

children are reasonable, and that any illegality in the deed does not prevent the Court from giving effect to provisions which are legal. A covenant not to institute a suit for divorce is not contrary to public policy; though a covenant not to institute a suit for restitution of conjugal rights might be. As regards the other covenant, the argument is based on the decision in *Vansittart* v. *Vansittart* (1); but that was a suit for specific performance, and the Court had to consider whether that agreement was good as a whole. Such a consideration need not be taken into account when a deed has been executed. The circumstance that one covenant fails as being illegal is no reason why the other should not be enforced, provided the illegality does not affect the whole deed. Again, in *Vansittart* v. *Vansittart* the Plaintiff could not have got from the Court of Divorce what she got by the deed of separation; here she could get something very like it. In *Vansittart* v. *Vansittart* the husband's object was to get rid of his children; there is nothing of the kind here. In *Vansittart* v. *Vansittart* there was nothing to shew that there was any danger of the children being brought in contact with any improper characters; here there is. For all these reasons, we say that that case affords no ground for abstaining from enforcing against the Defendant his covenant as to the elder two children, which is all we now seek.

Then as to the covenant for delivery up of the diaries and memoranda: he covenants to deliver them up forthwith; it is a breach of that covenant to keep them and copy them.

March 4. LORD ROMILLY, M.R., after stating generally the nature of the case, continued:—

With respect to the jurisdiction of the Court, which is exceedingly important in matters of this description, the case of *Vansittart* v. *Vansittart* is constantly referred to; and although that is an old case, in so far that it was before the statute passed for the regulation of the Court of Divorce under the present system, it was there laid down that if a husband, by a deed or by an agreement (in that case it was only an agreement), agreed to abandon

(1) 4 K. & J. 62; 2 De G. & J. 249.

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all his parental duties, and transfer them to the wife to be performed by her, this Court would not specifically enforce a contract of that description.

Then on the other hand, a case afterwards came before me which was unquestionably a case likely to try the principle very strongly —the case of *Swift* v. *Swift* (1), where the father had been guilty of moral turpitude towards his own child, a little girl of seven years old; and thereupon he consented to a deed by which the children were taken away from him and consigned to the mother. He repented of that afterwards, refused to pay anything under that deed, and insisted that he should have possession of the children; upon which the mother instituted a suit for the purpose of restraining him from so doing. Thereupon I endeavoured to point out that the limit of the jurisdiction must be defined in this manner, that the foundation of the jurisdiction lay in determining what was for the good of society in general; that it was against public policy to allow a father, under ordinary circumstances, to abandon his duties as a parent, and to allow another person to undertake those duties, and that there was no consideration which would be sufficient to enable a father to take that course. But on the other hand, a different and a controlling equity arose where the father had shewn himself utterly incompetent to perform those duties, and where he had so ill-behaved himself that the interposition of this Court was necessary for the protection of his children, in which case the jurisdiction is constantly exercised by this Court —the children being made wards of Court, and an application to take the children away from the custody of their parent allowed and complied with. And accordingly in the case of *Swift* v. *Swift* it was urged that the Court would have enforced this equity, and would have prevented the parent from taking the custody of his own children; that in that state of circumstances, if a contract were made which really had for its object, not a violation of public policy by taking away the parental duties, but the enforcement of what was due to public policy by preventing the demoralization of the children by their own father, the Court would interfere at least to that extent. Accordingly I so held in that suit, and upon appeal my judgment was affirmed by the Lords Justices.

(1) 34 Beav. 266; 34 L. J. (Ch.) 394.

I apprehend that that really does draw the line between the two cases, and that the doctrine of public policy which applies to these cases is in fact inverted according to the circumstances of the case. It is a compliance with the rules of public policy that prevents this Court from taking away the rights of the father. It is also a compliance with the rules of public policy which in another case induces this Court to prevent a father from injuring his own children. Therefore it is that you must not state the rule or principle so broadly as to say that under no circumstances whatever can such an agreement be supported.

This case came before me originally on mere allegation of misconduct on the part of the father, and I then held that I could not interfere in the case. Then the case went before the Lord Chancellor, and there the Plaintiffs proved the allegations of misconduct, and in my opinion proved them conclusively. In the first place, they proved the cruelty beyond question, and the Lord Chancellor so stated. He says that he does not consider they proved the adultery, and he does not choose to express any opinion on that subject; but in my opinion, on the aspect which the case wears at present, the adultery is proved.

In that state of things it comes back before me. What the Lord Chancellor has done is to direct that with respect to the elder two children the vacations shall be spent half with the mother and half with the father. That was the agreement between them. He thinks that that is a proper arrangement, and I think so too. Although it is quite true that there is evidence that these children might come in contact with the lady in question, yet I am not at all clear that in the circumstances of the case the father would bring them into constant communication with her; and unless I had further evidence upon that subject, I am not disposed to act upon it and say it is unfit that they should be with him at all. Therefore I think that the order which the Lord Chancellor made on that subject is a very fit and a very proper order; and all that I propose to do in the first instance upon that subject is to give effect to that order by making it permanent until the further order of the Court, with liberty to apply.

Now here I must notice what was the principal and main argument urged before me. It was said, "You must not proceed upon

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the deed at all; the deed itself is absolutely void; if the deed is void in any of its provisions, then you cannot proceed upon it at all; and you must proceed under the general equity." I asked if there was any case in which this Court had ever, under any general equity, at the instance of the mother, compelled the father to allow his children to spend half the vacation with her; and the counsel for the Defendant have failed to produce any case of that description where there was no foundation in contract, or where the children had not been made wards of Court, and where the application had not been to take the child away from the parent. In fact the Lord Chancellor's judgment is precise upon this point; he goes expressly upon a particular covenant in this deed; he gives no expression of opinion as to the rest, but he thinks fit to rely on this covenant and enforce it. I follow his Lordship in that respect; and I shall rely upon and enforce the covenant.

It is said that if one covenant in the deed is bad, the whole deed is bad. But I am not of that opinion. There may be deeds the substance of which may be carried into effect, but part of which may be either inoperative or wholly void. One very familiar instance which occurs to everybody is a marriage settlement. The marriage is a perfectly good consideration for a settlement on the issue of the marriage; but it is no consideration at all for a limitation over, in case of no children, in favour of strangers who have nothing at all to do with the marriage contract. In that case the Court would not specifically enforce that part of the deed itself. There are a great many instances which might be given where that is so. A covenant may be bad in a deed which is in other respects perfectly good. Therefore I do not intend to say anything about what may be the effect when the younger two children attain the age of seven years; as to whether the Court will prevent the father from taking possession of those young children when they each attain the age of seven, although up to the age of seven they are very properly, under *Talfourd's Act*, in the custody of the mother. I do not intend to express any opinion on that subject, the more so as it is very possible that this gentleman—who, although obviously of a warm temper, shews considerable affection for his children, and I have no doubt is in substance a right-minded person—may, before the children are seven years old,

undergo a very considerable change in his character and disposition, and a very different state of things may occur. At all events I do not mean to express any opinion on that; all that I propose to do is to adopt the Lord Chancellor's order as to the passing of the vacations and extend it until further order.

The next question which I have to consider is about the delivery up of the diaries and journals. By the deed the husband expressly covenants to deliver up to the wife all her journals and diaries; and accordingly he says that he has done so. But it appears that his argument now is, not that he resists the covenant, which appears to me to be a reasonable and proper covenant on a separation between husband and wife, but he contests the construction of the covenant. He says, "Saying that I will deliver up the journals and diaries, is no expression on my part that I did not intend to keep copies of them, and use the copies just as I should the originals." I am of opinion that the truth and honour of the covenant include the copies of the diaries and journals as well as the journals themselves. For what purpose could he keep them? Would it be to publish them? I apprehend this Court would enjoin a husband who is separated from his wife from publishing any private journals or diaries of hers, the publication of which she disapproved of, and which might be used to her disparagement; and also that he ought not to shew them to any other person. It is not pretended that there was anything in these journals or diaries inculpatory of the lady herself, or which would make most persons entertain a less favourable opinion of her. But private documents of that sort ought not to be made public. If there had been nothing more in the case beyond incompatibility of temper, so that they could not live together, and a good separation deed had been made by the interposition of trustees, containing a covenant against the debts of the wife, if in such a deed it had been covenanted that the husband should give up the wife's diaries, I am of opinion that this Court would have enforced that part of the deed, and that she would have been entitled to have them delivered up. Therefore in that respect I shall require the diaries and the journals to be delivered up to her, and also the copies of them.

Then I think there is nothing more that I have to dispose of,

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because with respect to all the other covenants in the deed, I do not mean to go through them. There may be some of them that I may think not fit to be carried into execution. I have considered the case of *Vansittart* v. *Vansittart* (1), and the distinctions which were drawn by Mr. *Lindley* between that case and this are, I think, very just. Above all, that was an executory agreement, and not an executed deed, which it is in this case. But I do not mean to say that every one of the covenants in this deed will be fit to be carried into execution when the proper time comes. I mean to say nothing more on that subject, but reserve liberty to apply, in order to see what course the parties take.

I do not intend to make the decree go beyond what I have said; but I am of opinion, looking at the whole of the case, that this suit has been occasioned by the husband, and that he must pay the costs of the suit up to the present time.

Solicitors: Messrs. *Janson, Cobb, & Pearson;* Messrs. *Clarkson, Son, & Greenwell.*

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EARL FERRERS *v.* STAFFORD AND UTTOXETER RAILWAY COMPANY.

[1871 F. 34.]

Railway Company—Vendor's Lien—Costs of Arbitration—Lands Clauses Act, 1845, *ss.* 34, 75, 80.

Where land is taken by a railway company, and the purchase-money is ascertained by arbitration under the *Lands Clauses Act,* 1845, the vendor is not entitled to a lien on the land sold for the costs of the arbitration payable to him by the company.

IN October, 1863, the *Stafford and Uttoxeter Railway Company* served on the Plaintiff, Earl *Ferrers* (who was then an infant), the usual notice to treat for the purchase by the company, for the purposes of their undertaking, of certain lands to which Plaintiff was entitled as tenant in tail, and it was arranged that the amount of the purchase-money to be paid by the company should be settled by arbitration. Arbitrators and an umpire were accordingly duly

(1) 4 K. & J. 62; 2 De G. & J. 249.

appointed. The arbitrators differed in opinion, and in July, 1864, the umpire made his award, by which the sum of £8887 (being a larger sum than had been offered by the company for the purchase of the lands) was awarded to the Plaintiff. Under these circumstances the Plaintiff's costs of and incidental to the arbitration became payable by the company, pursuant to the 34th section of the *Lands Clauses Act*, 1845.

The purchase-money was duly paid into Court, and on the 25th of February, 1865, an order for the investment of the money was made on the petition of the Plaintiff by his next friend. This order also directed payment by the company to the Plaintiff's next friend of the Petitioner's costs (if any then remaining unpaid), including therein all reasonable charges and expenses incidental thereto of the purchase or taking of the lands aforesaid, other than such costs as were, by the *Lands Clauses Act*, otherwise provided for.

On the 15th of April, 1867, the umpire in the arbitration made an award by which he assessed the Plaintiff's costs of and incident to the reference at the sum of £414 2*s.* 4*d.*; and those of the arbitrator nominated on behalf of the Plaintiff at £79 2*s.* These sums were not paid by the company, and in March, 1871, the Plaintiff (who attained the age of twenty-one years in January, 1868, and subsequently barred his estate tail) filed the bill in this suit claiming a lien as an unpaid vendor on the lands sold by him to the company in respect of these sums.

No conveyance to the company had been executed, but the company had been in possession since 1865, and had constructed their railway on the land.

Sir *R. Baggallay*, Q.C., Mr. *Dauney*, and Mr. *A. T. Watson*, for the Plaintiff:—

The contract is that the company are to pay the compensation fixed by the arbitrators or their umpire, and also to pay the costs of the arbitration if the compensation awarded exceed a certain sum. Under these circumstances the costs of the arbitration become a part of the price, and the vendor is entitled to a lien for them: *Walker* v. *Ware, Hadham, and Buntingford Railway Company* (1).

(1) Law Rep. 1 Eq. 195. 35 Beav 52. 12 Jur NS 518

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Mr. *Southgate*, Q.C., and Mr. *Millar*, for the Defendants:—

Sect. 34 of the *Lands Clauses Act*, 1845, provides that in cases such as this the costs shall be borne by the promoters, but it does not make them part of the purchase-money. In sect. 63 is an express provision that compensation for severance shall be treated as part of the purchase-money; but there is no similar provision as to costs. The costs may be recovered by means of the order of this Court made on the 25th of February, 1865, under sect. 80, or by distress under sect. 53; but there cannot be any lien for them; and sect. 75, which enacts that, upon deposit in the bank of the purchase-money awarded, the owner of the lands shall convey, when required to do so by the promoters of the undertaking, to them, or as they shall direct, is conclusive against the claim of the owner to a lien for costs.

Walker v. *Ware, Hadham, and Buntingford Railway Company* (1), does not really affect the case, but, if it does, is an authority in favour of the Defendants; for the lien in that case was held to extend only to the purchase-money, and not to the costs of an action brought to enforce the award.

Sir *R. Baggallay*, in reply:—

There is no clause in the Act as to the enforcement of costs awarded by the arbitrators, and we are unable to get anything from the company (which is in pecuniary difficulties) by means of the order of the 25th of February, 1865.

[He referred to *Gould* v. *Staffordshire Potteries Waterworks Company* (2)].

March 12. LORD ROMILLY, M.R.:—

This suit is instituted for the purpose of establishing a lien on the land bought by the railway company from the Plaintiff, Lord *Ferrers*, and raises quite a new question. The facts are shortly these: The sale of the property to the railway company took place on the 13th of June, 1864. It was arranged that the price should be fixed by arbitration. Accordingly the arbitrators met, they

(1) Law Rep. 1 Eq. 195. 35 Beav. 52. 12 Jur. N. S. 10.

(2) 5 Ex. 214.

differed, and they selected an umpire; and the umpire settled the price at £8887, which included the damages for severance—in fact included everything except the mere costs. This amount was duly paid into Court, and was duly invested, but the costs were not paid. By sect. 34 of the *Lands Clauses Act*, it is quite clear that the company had to pay the costs, because the umpire awarded more than the company were willing to give. No step took place to settle what the amount of those costs was till nearly three years afterwards. I do not understand what the cause of the delay was; however the umpire, in the early part of the year 1867, settled them at £414 2*s.* 4*d.* That was done after the investment of the purchase-money according to the *Lands Clauses Act*, the order for which was made, on the petition of Earl *Ferrers*, on the 25th of February, 1865; and by that order it was ordered that the company were to pay all the costs according to the Act. Those costs, according to the Act, included the costs of the award and of the arbitration. Those have not been paid; the Plaintiff has taken no steps to enforce payment in the way in which he might have done; but the result has been that up to this time they have not been paid at all. Then this bill is filed by Earl *Ferrers* for the purpose of getting it declared that these costs are a lien upon the land, and for the usual consequential relief in cases of lien. I have to consider whether I can properly give him that relief or not. It is obviously a case of very considerable importance, because it gives precedence to this particular creditor in respect of these debts over all the other creditors of the company. Was that intended? In the first place, the Act, so far as I am aware—and I have looked through it very carefully—states no mode as to how you are to recover your purchase-money, but leaves you to your ordinary remedy, that is, if the purchase-money is not paid you may file a bill for specific performance of the contract, or enforce payment of the purchase-money in any way you think fit. The Act does not give the remedy, nor does it say that the company are to pay the purchase-money, but the Act does say that the company are to pay the costs. In addition to that it tells you how you are to recover the costs. You may recover them by an order of the Court of Chancery, under sect. 80. So that it would appear there is a distinction

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between the purchase-money and the costs. It is argued that a vendor may say, "I won't convey the land to you, and I will not do anything about it until you pay the costs." But the Plaintiff has not taken that course. He has obtained a due investment of the money, and also an order in the usual form, such as is made every petition day, for the payment of the costs. The ways in which payment of the costs may be enforced are numerous. In the first place, the order of the Court is equivalent to a judgment. Nay more, you might bring an action upon the award, and recover them in that way. I believe also you might have a mandamus. At all events there is no difficulty in getting judgment against the company for the costs, and obtaining a lien upon this land by this means, but of course only *pari passu* with the other creditors of the company.

The 75th section has a strong bearing on this case. It states that upon a deposit of the purchase-money being made in Court, not only is the company entitled to insist upon having a conveyance of the land made to them, but if the vendor will not convey the land, they may execute a deed poll, and get the land vested in themselves in that manner, and they may require the land to be conveyed, not only to themselves, but to any person whom they may think fit. Suppose that the company, finding they do not want the whole of the land, sell the portion not required, which is conveyed by their direction to the purchaser, of course the same principle must apply to every portion of the land; and then this purchaser finds, to his great surprise, that costs have not been paid, and that the vendor claims a lien for these costs. I do not think that this was the intention of the Act, and, certainly, I am not going to make a new precedent upon that subject. If the Plaintiff is right, then in every case in which an order has been made for costs according to the Act, if there is any delay in the payment of them, a bill may be filed against the purchaser from the company for the costs, which would carry with it all the costs of the bill, the costs of the petition, and all the usual charges, although the purchase-money had been paid and the company had got into possession, sold it or a part of it again, and put the purchaser of that part in possession. Here the company have paid the purchase-money, and have been in possession for upwards of six years. In 1871 a bill is

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filed for a lien on this particular land, that is to say, a vendor's lien in respect of the costs, or a portion of the costs, which have been incurred before this time. I think, upon the true construction of the Act, the Plaintiff is not entitled to that. I am of opinion that if a person receives the due amount of the purchase-money, and either a conveyance is given, or what is tantamount to it, the vendor cannot afterwards say there are certain costs which have not been paid, and which are a charge upon the land. No doubt there is a charge upon the land for the unpaid purchase-money; but in this case that is all settled, and there is no question upon that part of the case.

I think, therefore, this suit is an experiment which I am not disposed to encourage, and I must dismiss the bill with costs.

Solicitors: Messrs. *Austen, De Gex, & Harding*, agents for *Smith & Mammatt, Ashby-de-la-Zouch;* Mr. *J. Batten.*

In re ALBERT AVERAGE ASSOCIATION.
BLYTH & CO.'S CASE.

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Mutual Insurance Association—Policy—Stamp.

B. & Co., by letter, authorized the managers of a mutual marine insurance association to insure a ship with the association, and undertook to abide by the rules and regulations thereof. By the rules, each insurer became liable to contribute to the losses of any other insurer in certain proportions. In pursuance of the authority given by *B. & Co.*, a duly stamped policy was issued to them, which, however, contained no reference to the rules:—

Held, that the letter, although not stamped, was admissible in evidence, and that *B. & Co.* were contributories.

Smith's Case (1) distinguished.

THIS was an application by the official liquidator of the *Albert Average Association* that Messrs. *Blyth & Co.* might be settled on the list of contributories.

The *Albert Average Association* was an unregistered mutual marine insurance company, governed by rules and regulations by which it was provided (amongst other things) that the members, severally

(1) Law Rep. 4 Ch. 611.

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and respectively, not jointly, nor in partnership, nor the one for the other, but each only in his own name, agreed to insure each other's ships, for one year from noon of any day named as the commencement of the risk, against all perils described in the policy; that the managers should be *James Jackson* and *William Sheppard;* that the ships insured should be divided into different classes therein specified, and pay the different annual rates therein mentioned, which were to be payable in advance, and to be placed to the credit of the member paying the same, and if the amount exceeded the amount of claims for losses or damages sustained by the members during each year respectively, the excess was to form a reserve fund to stand to the credit of each member proportionally as he might have contributed; and should it be that such contributions were not sufficient to meet the claims of members for loss or damage sustained within any respective year, then such reserve fund should be applied to meet such deficiency, and should there still be a deficiency, such sums as might be required to meet the same should be drawn for on each respective member in such proportion as therein mentioned; and that any member who might desire to withdraw any ship at the end of the current year for which she was entered in the association, should give to the managers ten clear days' notice in writing before the expiration of the year, and that in default thereof, he should be considered to have renewed the insurance of such ship for another year.

On the 21st of July, 1868, Messrs. *Blyth & Co.* addressed to Messrs. *Jackson & Sheppard*, as the managers of the association, a letter whereby they authorized them to insure in the association, in the sum of £750, the ship *Trusty*, and they undertook to abide by the rules and regulations of the association.

In pursuance of this application, a duly stamped policy of insurance on the ship in question, covering a period of one year from the 21st of July, 1868, was issued to Messrs. *Blyth & Co.* This policy contained no reference to the rules and regulations of the association.

Messrs. *Blyth & Co.* gave no notice of withdrawal of the ship, pursuant to the rules and regulations, and on the 21st of July 1869 a fresh policy for one year from that date was issued to them. During the currency of that policy the association was ordered to be wound up.

Mr. *Southgate*, Q.C., and Mr. *E. C. Willis*, for the official liquidator, relied on the undertaking contained in the letter of the 21st of July, 1868.

Mr. *E. Cutler*, for *Blyth & Co.*:—

There is no reference to the rules and regulations in the policy, nor is there anything which binds us to become members of the association. The letter of the 21st of July, 1867, is not stamped, and cannot be looked at: *Smith's Case* (1).

[He also cited *Lee & Moor's Case* (2).]

LORD ROMILLY, M.R.:—

I think that Messrs. *Blyth & Co.* are contributories. I consider that I am not only at liberty, but bound to look at the letter of the 21st of July, 1868. That letter and the policy form parts of one agreement; the policy is properly stamped, and therefore the ground of the objection which was successfully taken in *Smith's Case*, where no policy was issued, is removed.

Solicitors: Mr. *Blewitt*; Messrs. *J. & R. Gole.*

(1) Law Rep. 4 Ch. 611. (2) Law Rep. 5 Eq. 368.

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15 Eq. 385.

In re GARNIER.

Lunatic—French Curator Bonis—Trustees Relief Act.

An Englishman while resident in *France* was found a lunatic by the law of that country, and a *curator bonis* was appointed by the French Court. A fund in this country to which the lunatic became entitled was paid into Court, under the *Trustees Relief Act*:—

Held, upon Petition by the *curator bonis* for payment of the fund to him as a matter of right, that the Court could exercise a discretion; and, it appearing that the lunatic was sufficiently provided for, an order was made for retaining the *corpus* of the fund in Court, and the payment of the dividends only to the *curator*.

THIS was a Petition by *Alfred Ravant*, a Frenchman, who had been appointed provisional committee and *curator bonis* of *Charles Garnier*, a lunatic found so under the French law, for payment out of Court to him of a sum of £939 11*s.* 1*d.*, which had been paid in under the *Trustees Relief Act*.

Charles Garnier was a British subject, and while travelling in *France*, during the year 1851, he became of unsound mind. He was found a lunatic by the law of *France*, and was placed in a *maison de santé*, in *Paris*, where he had ever since resided. The Petitioner, *Alfred Ravant*, was the registrar of the *juge de paix*, in the canton of *St. Germain*, and was the properly constituted committee of the estate of the lunatic according to the French law, and was empowered by the Court having jurisdiction in such cases to take and receive, upon his simple signature, all sums of money which might accrue to the said *Charles Garnier*, either in *France* or in *England*, and to give good and available receipts and discharges for the same.

The sum of money which the Petitioner now asked to be paid to him was a portion of the estate of *F. Garnier*, a relative, to which the lunatic was entitled, and which had been paid in by his sister, *Laura Radcliffe*, as administratrix of *F. Garnier*.

It was stated in evidence, that in pursuance of the law of *France* a family council was called together for the purpose of deciding whether *Charles Garnier* was sane or insane, but in consequence of no relations being resident at that time in *France*, the council was

composed of six persons who were well acquainted with Mr. *Garnier*, and upon the report of this council that he was incapable of taking care of himself or his property, an order was made by the *juge de paix*, under which he was placed in an asylum or *maison de santé*, then under the control of a Dr. *Penel* but since transferred to Dr. *Semelaigne*, and the Petitioner was also appointed committee of his estate [*curator bonis*] by the Judge, with power to perform all necessary acts of administration, with directions to render an account of his administration, and reserving the right to make application according to law for the care of the person of the lunatic, if occasion should require. It had not, however, become necessary to appoint a committee of the person of the lunatic, in consequence of the asylum in which he was placed being under the direct superintendence and surveillance of the law.

The personal estate of the lunatic in *France* consisted of a sum of money derived from his deceased wife, and invested in the French £5 per Cent. Rentes, producing an income of about £168 per annum, the bulk of which income was applied for the support and maintenance of the lunatic in the establishment of Dr. *Semelaigne*. It was stated by the Petitioner that in consequence of the reduction of the French Rentes from £5 to £4 10*s*. per cent. the income of the lunatic had become diminished, and owing to the prices of provisions, wearing apparel, rent, and personal services having been largely increased during the last year, the lunatic had been necessarily deprived of many comforts and advantages requisite for his position which he had previously enjoyed. The Petitioner stated that if the Court ordered the sum of money now standing to the lunatic's credit to be paid out to him, it was his intention forthwith to invest the same in the new £5 per Cent. French Rentes, which would produce to the estate an increased income, and would enable him to obtain additional comforts for the said *Charles Garnier*.

The law of *France* regarding the management of lunatics was properly verified by French lawyers, and it was stated that the Petitioner was bound to give security to the Court as the holder of his office of Registrar, but no additional security was exacted from him in respect of the discharge of his duties as committee of the lunatic. The Petition was opposed by the relations of *Charles*

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Garnier, on the ground that it was not desirable that the money now in Court should be taken out of the control of the Court and paid over to a French committee, to be placed on the security of French Rentes; that there was a further sum of £120 per annum, derived from property belonging to the lunatic, which was in the hands of Messrs. *Childs*, the bankers, and which, at the direction of the relatives of *Charles Garnier*, had been regularly paid to Dr. *Semelaigne* for his benefit, and this sum, in addition to that received by the Petitioner, was amply sufficient for the comforts of the lunatic in the position in which he was placed.

Mr. *Glasse*, Q.C., and Mr. *Begg*, for the Petitioner:—

This money has been paid into Court under the *Trustees Relief Act* (10 & 11 Vict. c. 96). The lunatic is absolutely entitled to it, and the Petitioner, who is the legally constituted *curator bonis* according to the law of *France*, where the lunatic is domiciled, is now entitled to have the money paid out to him. The Court has no power to refuse the application. The estate of the lunatic is vested in the Petitioner, just as it would be in the committee of a lunatic in this country, or in the assignee of a bankrupt. He is in the position of the legal personal representative, and the Court is bound, under the *Trustees Relief Act*, to pay the whole of the fund over to the Petitioner, who is answerable to the French Court for the proper application of the fund. In *Scott* v. *Bentley* (1) it was decided by the present Lord Chancellor, when Vice-Chancellor, that the right to sue for the property of a lunatic in *Scotland* was vested in the *curator bonis* appointed according to the law of that country, and that he could give a good discharge for the money; and this case is precisely the same. The *curator bonis* appointed by the French Court has the same power to sue, and the same absolute control over the fund, as a Scotch curator would have in a Scotch lunacy. The amount of the fund has nothing to do with the question; the curator is responsible only to the French Court. To that Court he has given security for the due performance of his office, and this Court can exercise no discretion, nor give any directions as to the application of the money.

Hessing v. *Sutherland* (2) was a case in which the Lords Justices

(1) 1 K. & J. 281. (2) 25 L. J. (Ch.) 687.

ordered the transfer of a fund standing in the names of the trustees to the *curator bonis* appointed in *Scotland* of an English lunatic; and in *Newton* v. *Manning* (1), the Lord Chancellor said that if the law of *France* warranted the Petitioner in dealing with the *corpus* of her husband's property in the manner proposed, she had only to arm herself with the authority of the foreign jurisdiction, and the money would be paid out to her as any other sum of money in Court would be paid out to a party shewing a title to it. Here the Petitioner comes with the authority of the French Court, and has shewn a title to receive the money, which is all that is requisite for him to do. In *Mackie* v. *Darling* (2) it was held that a *curator bonis* and *factor loco tutoris* of Scotch infants was not bound to pay into Court assets belonging to the infants, receivable under an English will of which the curator was administrator, and which was in the course of administration by the Court; and in *Re Elias* (3) an order was made, upon the application of a curator of a lunatic resident in *Holland*, for the transfer to him of the *corpus* of a fund in *England*, to which the lunatic was entitled.

We have shewn our title to this fund, and are entitled to the order we ask.

Mr. *Cotton* Q.C., and Mr. *Bevir*, for the relations of the lunatic:—

The Petitioner is not entitled to this fund as a matter of right. It is true that he is the duly appointed *curator bonis* of the lunatic in *France*, and we do not question his right to give a discharge for the money paid to him; but it is a matter for the discretion of the Court whether the *corpus* of the fund should be paid out to him. If this were a question arising within the jurisdiction in lunacy, the Court would have power to inquire as to the amount which was required for the support of the lunatic. This was decided by the Lord Chancellor in *Re Stark* (4), where, upon an application by the *curator bonis* of a Scotch lunatic for the transfer of stock standing in the lunatic's name in the *Bank of England*, the Lord Chancellor was not satisfied that the security given by the curator in *Scotland* was sufficient, and considered that it was a matter of discretion to refuse or accede to the application.

(1) 1 Mac. & G. 362.
(2) Law Rep. 12 Eq. 319.
(3) 3 Mac. & G. 234.
(4) 2 Ibid. 174.

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So in *Re Morgan* (1) it was held that the Act of 1 Will. 4, c. 65, s. 34, did not render it imperative on the Lord Chancellor, upon the application of a *curator bonis* of a lunatic appointed by the Court of Sessions in *Scotland*, to order a transfer of stock standing in the lunatic's name in the *Bank of England* into the name of the curator. The Chancellor there ordered payment of the dividends only, and refused a transfer of the *corpus* of the fund. *Re Sargazurietta* (2) is a similar case; for there, upon a petition under the statute 56 Geo. 3, c. 60, for the re-transfer to the committee of a lunatic of a sum of money from the Commissioners for the Reduction of the National Debt into the name of the curator of a person found lunatic at *Genoa*, the Lord Chancellor directed the stock to be transferred to the Accountant General, and the dividends only to be paid to the Petitioner. All that the Court has to do in lunacy is to pay so much of the dividends of a fund as may be required for the support of the lunatic; and this is a question for the discretion of the Court.

The case of *Scott* v. *Bentley* (3) only decided the right of a curator appointed in *Scotland* to sue and give discharges. This we do not deny. *Newton* v. *Manning* (4) had reference to the amount of security given by the curator. In *Hessing* v. *Sutherland* (5) no objection was made to the transfer of a fund to the curator, but the trustee required the indemnity of the Court for the purpose. In *Mackie* v. *Darling* (6) a *curator bonis* of Scotch infants was held not bound to pay into Court assets belonging to the infants receivable under an English will, of which the curator was administrator, and which was in course of administration by the Court; but that is a very different case.

In bankruptcy the same principle is acted upon, and it is not imperative upon the Court to pay out to the assignee more than is required for the debts. It is for this Court to decide what shall be done with the surplus after payment of debts. This was decided in *Cook* v. *Sturgis* (7) and *In re Dyson* (8).

In the *Trustees Relief Act*, under which the Court is now called

(1) 1 H. & T. 212.
(2) 20 L. T. 299.
(3) 1 K. & J. 281.
(4) 1 Mac. & G. 362.
(5) 25 L. J. (Ch.) 687.
(6) Law Rep. 12 Eq. 319.
(7) 3 De G. & J. 506.
(8) 29 L. J. (Q.B.) 68.

upon to act, it is expressly stated that such order shall be made as to the Court shall seem fit. There is a discretion, therefore, vested in the Judge as to the terms and the amount of payment; and it is not simply because a Petitioner shews that the fund is vested in him, as trustee, for a particular purpose, that he is entitled to have the whole corpus paid out to him as a matter of right.

The evidence in this case shews that the lunatic is sufficiently well provided with all the necessaries and comforts that his situation requires. It is alleged that the income might be increased by the principal being placed in the French Rentes. This might also be done by the Court sanctioning the investment of the fund in more remunerative securities; but no necessity for such a course is proved on behalf of the curator, and he has given no good reasons for removing the fund from the control of this Court, which the relations of the lunatic consider to be a safer and more effectual protection than placing it in the hands of the official curator appointed by the French Court, particularly as it appears that he is not called upon to give security for the amount which he claims a right to the possession of. The security which he gave to the French Court was a general guarantee for right conduct in his office, and not a guarantee applicable to this particular matter.

Mr. *Glasse*, in reply, cited *Phillips* on Lunacy (1) and *Thorne* v. *Watkins* (2).

SIR R. MALINS, V.C.:—

This is a Petition to take a sum of £939 11*s.* 1*d.* Consols out of Court, that sum of Consols being the absolute property of *Charles Garnier*. The circumstances are peculiar, and the Petition raises a question of so much importance relating to the estate of a lunatic (though not so found by inquisition in this country, and therefore not subject to the jurisdiction in Lunacy of the Courts of this country) that I was very desirous at first that the course should be adopted of making the application to the jurisdiction in Lunacy—that is, the Lords Justices—rather than have the matter argued before me; and I certainly think I should have

(1) Page 410. (2) 2 Ves. Sen. 35.

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insisted upon that course if I had been aware that the same view had occurred to the Master of the Rolls in the case of *Hessing* v. *Sutherland* (1), and that the Lords Justices did take that case. But as the question has been fully argued before me, and I have formed a very distinct opinion upon it, I think it is better that I should decide it.

The point which arises on this Petition is this: Mr. *Charles Garnier*, being a resident in *France* (he was not at the time domiciled in *France*, though now he may be considered as a lunatic there domiciled), became of unsound mind. Before the tribunals of that country the necessary and proper steps were taken for establishing the lunacy, and putting his person and his estate under proper care, much as it would have been in this country; and the present Petitioner, M. *Ravant*, is the person appointed curator, and has vested in him the estate of the lunatic. This sum of £939 11*s.* 1*d.*, to which the lunatic became entitled upon the death of a relative, has now been paid into Court by his personal representative. The curator petitions to take the money out of Court. There is also, it appears, a considerable amount of property belonging to the lunatic in *England*, some £3000 or £4000, which is in the hands of Messrs. *Child & Co.*, the bankers, who, under the authority of the relatives of the lunatic, the brother and sister—near relatives—have from time to time sent the dividends of the stock in their hands (Dutch bonds) for the maintenance of the lunatic.

The curator claims by this Petition to be the complete representative of the estate of the lunatic, and in him is vested, as he says, the right to take possession of all his property, to sue for all his rights, to maintain actions on behalf of his estate, and, in fact, in every respect, in the most complete manner, to represent that estate, and to take possession of every part of it whatever. The first part of the argument addressed to me on behalf of the Petitioner was as to a point upon which I do not feel the slightest doubt. I have no doubt that this curator in *France* has completely vested in him the whole estate of the lunatic, and that he is entitled to sue on his behalf, and to ask this Court to hand out to him, as the representative of the lunatic in whom the property is

(1) 25 L. J. (Ch.) 687.

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vested, this money; but the question is, whether I have any discretion on the subject, or whether I am bound, because he asks it, to hand over this fund to him. That raises the whole question, whether the curator of the estate in *France* is necessarily entitled to have the possession of every part of the lunatic's estate, however large it may be, merely because he is such legal representative. There are many instances of this kind, no doubt, where property is absolutely vested in a person, either completely or for a particular purpose. The case of *Scott* v. *Bentley* (1) is conclusive upon the subject; and there are many other authorities even so far back as Lord *Hardwicke's* time. Take, as an example of this, the case of an assignee in bankruptcy. No man can have more absolute control over the property of another than an assignee in bankruptcy has over the estate of the bankrupt; and so it was in insolvency when there was a difference existing between insolvency and bankruptcy. But the property is there vested in the assignee for a particular purpose only, and I am perfectly satisfied that if there was a large amount of money in this Court which the bankrupt claimed against the assignee, and the assignee came here with this kind of high claim saying, "I have vested in me the whole estate of the bankrupt, the Court has not any right to enter into the question of what is the amount of the debts," I am satisfied that if it were made apparent to the Court that there was £20,000 in Court belonging to the bankrupt, and if it were also made apparent that £10,000 would pay all the debts and expenses of the bankruptcy—in other words, that the whole bankruptcy could be wound up for £10,000—the bankrupt would, in that case, be entitled to resist the Petition by the assignee to pay out to him more than the amount required in the bankruptcy.

The case of *Cook* v. *Sturgis* (2), also heard at law under the title of *Re Dyson* (3), has a bearing on this question. The facts were these: *Dyson* was a man who had a large expectancy. He was insolvent. After his insolvency, it being clear that there would be a surplus after paying all his debts, Mr. *Robert Cook* bought the surplus of the insolvent *Dyson*. He was entitled to the whole of the surplus, whatever it might be, which remained of

(1) 1 K. & J. 281. 6 Jur N S 394 (2) 3 De G. & J. 506. 6 Jur N S 475
(3) 29 L. J (Q.B.) 68. 6 Jur N S 214

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the estate after paying the debts and expenses of the insolvency. It was sold to Mr. *Cook* for valuable consideration, and there was a large fund in Court; but *Dyson* became insolvent a second, and I think even a third, time. Mr. Commissioner *Law*, who took as high a view of the rights of the Court of Insolvency as the Petitioner desires to take of the rights of the curator in *France*, claimed to be entitled to deal with the whole estate of *Dyson*, and insisted that it should all be handed over to the Court in *Portugal Street*, that he might deal with the rights of the parties as to the whole estate. In that case I obtained an injunction on behalf of Mr. *Cook*, and Lord Justice *Knight Bruce* and Lord Justice *Turner* acted upon the principle that the assignee was entitled to so much only of the money as would pay all the debts in full and the expenses of the insolvency, and that Mr. *Cook* was entitled to have it retained in Court to have the matter adjudicated upon and the amount ascertained. Mr. Commissioner *Law* did not acquiesce in that decision, and still insisted upon dealing with the whole fund, and for his disobedience to the order of this Court I moved, before the full Court, consisting of Lord Chancellor *Campbell* and the Lords Justices, to commit Mr. Commissioner *Law* for disobedience to the Court of Chancery in attempting to get possession of those funds. He was not committed, but he had a narrow escape. In that case their Lordships retained all the funds in Court. If I had an assignee in bankruptcy before me saying, "I must have everything handed over to me, I am master of the estate," I should say, "It is vested in you only for a particular purpose; tell me what you require for debts and expenses connected with the bankruptcy, and that sum you shall have, and no more." This property is vested in M. *Ravant* by the laws of *France*—for what? For a particular purpose. What is that purpose? The maintenance and well-being of the lunatic.

I will take an analogous case in this Court. Of course I am perfectly aware I am not sitting in Lunacy, but I have had considerable experience in the jurisdiction of Lunacy during my professional career, and I think I have not quite forgotten what is the practice of the Court in Lunacy. The committee has vested in him all the property and estate of the lunatic; but does the Court ever as of course hand out the whole of the money to the committee?

Certainly not. On the contrary, the Court makes an order for an allowance for the maintenance of the lunatic, and hands that over to the committee of the person. The committee of the estate would receive what he was entitled to for remuneration, and whatever else is in Court remains by way of accumulation for the benefit of those ultimately entitled. Upon all questions regarding the estate of the lunatic, whom does the Court hear as to the ultimate interest? Why, as to the real estate, the person who is heir-at-law; and as to the personal estate, the person who is proved to be the next of kin. Here I have the next of kin before me, for there is no question raised about the brother and sister being next of kin, and they object to the money going to *France*, and they say that they are entitled to object. I asked whether the capital was wanted, and it turns out upon the evidence that this gentleman is not the curator of the person, but of the estate only. It is stated that he wants these funds, not to apply the capital for the benefit of the lunatic—that is not suggested—but he wants it to invest in the French funds, in order to produce a larger income for the lunatic. It appears that there is £48 due to this gentleman for expenses incurred in the lunacy. It is not objected that that £48 should be paid, and the costs of this Petition should also, I think, be paid. Then what does he want the fund for? All the argument has been on a question of privilege, and what is called a legal right. With regard to the comfort of the lunatic, the Petitioner says he is liable to Dr. *Semelaigne* for his maintenance. It turns out that the friends of this lunatic, being persons of position and means, supply him with everything he requires. The income of the funds in the hands of Messrs. *Child* has been transmitted by members of the family to Dr. *Semelaigne;* and I am perfectly satisfied that the lunatic is supplied with every comfort adapted to his condition in life, everything essential for him; and this gentleman does not pretend to say that there is anything he wants which he cannot have.

It has been argued that this Court can exercise no jurisdiction, it being a foreign lunacy. Then the question for me to decide is, whether I have a discretion or not. To ascertain that, I cannot do better than see what the Court has done with regard to foreign lunatics; because, as to the jurisdiction of this Court, whether it

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is in *Scotland*, *Holland*, or *France*, it is all the same. What has the Court done in such cases? I think the case of *Scott* v. *Bentley* (1) does not strictly apply to this question, because the Vice-Chancellor *Wood* was not there asked to exercise any discretion on the subject. All he had to decide was, whether the right to sue for the property and to recover it was in the Scotch curator. He decided that he had that right, and the question of discretion was not suggested or argued before him in any way.

Let me take the case of an actual lunatic in a foreign country. In the case of *Newton* v. *Manning* (2) very little seems to have occurred on the subject, and that does not appear to me to be a distinct authority one way or the other; but I cannot help thinking that the case of *Re Stark* (3) is important. That was a petition, supported by the affidavit of *Robert Spottiswoode*, of the city of *Edinburgh*, stating that he had been appointed by the Court of Session in *Scotland curator bonis* of the lunatic's estate, and praying a transfer of a sum of £4005 Consols standing in the lunatic's name at the *Bank of England*, with the dividends thereon, to him as such curator, and that he might be at liberty to retain the costs of his application thereout. Mr. *Baily*, for the Petition, referred to the decree of the Court in *Scotland*, whereby the Petitioner was appointed curator, and which, he submitted, was equivalent to a declaration in Lunacy. The Lord Chancellor, however, declined to make the order as prayed in the first instance, observing that the evidence furnished by the decreet fell short of establishing the lunacy under the terms of the Acts. His Lordship accordingly directed a reference to inquire whether Mrs. *Stark* had been found lunatic according to the laws of the place where she was resident, whether the stock formed part of her personal estate, and whether the Petitioner had been duly appointed *curator bonis*, and had given security accordingly, and was properly qualified to have the stock transferred to him. This *curator bonis* in *Scotland* had just as absolute an authority and control over the estate as the curator in the French Court has in the present case. How was that dealt with? The Commissioner who decided that case was Lord *Langdale*, and he referred to a case of *Re Morgan* (4), in

(1) 1 K. & J. 281. (3) 2 Mac. & G. 174.
(2) 1 Mac. & G. 362. (4) 1 H. & T. 212.

which, under similar circumstances, the Lord Chancellor (Lord *Cottenham*) had refused an application like the present. It was there held that the Act of 1 Will. 4, c. 65, left it in his discretion to grant or refuse such an application. His Lordship then added that, in conformity with this precedent, so large a sum as that mentioned in the Petition ought not to be transferred to the curator on the security stated by the Master's report to have been given, especially as no reason was assigned for the transfer. An order was therefore made confirming the Master's report, and directing the payment of the dividends only of the stock to the curator. In the case before me no reason, in my opinion, or anything amounting to a reason, is assigned for the transfer; and in the case I have first referred to so small a sum as £4000 was refused, and the Court directed payment of the dividends only, and exercised its discretion in refusing the capital.

It was argued that it makes no difference what the amount is. I put it to the Petitioner's counsel whether he would carry the case so high as to say that, in consequence of this legal control of the curator, even if the amount in question were a million of money, or say £100,000—any large sum whatever—whether I must necessarily hand over all this property to him, or, as it is not wanted for the purpose for which he is appointed, namely, the maintenance of the lunatic, to the French tribunals. When the lunatic recovers, if he recovers, he will be entitled to all this money. Why should he be embarrassed with the French Courts? Why should his relatives be embarrassed with proceedings in a foreign country when every purpose can be answered by keeping the property in this, the lunatic's native country. The case of *Re Morgan* (1) seems to me to be conclusive upon the subject. An application was made to the Lord Chancellor on the Petition of the *curator bonis* of the lunatic, who resided in *Edinburgh*, praying a transfer of a sum of £90,067 18*s*. Three-and-a-half per Cent. Bank Annuities, standing in the lunatic's name, into the name of the *curator bonis;* but the Lord Chancellor declined to make the order, on the ground that the Act of 1 Will. 4, c. 65, was not imperative, but left it in his Lordship's discretion to grant or refuse the application; and his Lordship, not being satisfied that the

(1) 1 H. & T. 212.

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security taken by the Court of Session in *Scotland* from the *curator bonis* was sufficient, ordered the Petition to stand over. It appears here that no security is taken in this lunacy such as a committee would have to give; all the security that is given is for the due performance of his office generally. At a subsequent hearing of *Re Morgan* an order was made that the dividends on the £90,067 18*s.* should be paid over from time to time during the life of the lunatic to the *curator bonis*. Therefore that was a case where the Court distinctly refused to hand over the capital to the curator, thinking the income sufficient, and ordered the income to be paid, but refused the capital.

Then the case of *Re Elias* (1) is relied upon; but the point which I have now to decide was never suggested in that case. In *Re Elias* there was a considerable sum of *East India* Stock, and the lunatic was resident in *Holland*. The Lord Chancellor (Lord *Cottenham*) made an order authorizing the Petitioner, while provisional curator, to receive the dividends of the stock, and referred it to the Master to ascertain whether the Petitioner was, according to the law of the kingdom of the *Netherlands*, entitled to have the funds transferred to him. No inquiry was directed as to whether the Petitioner had given any security, and it did not appear whether the lunatic was a native of *Holland*. Now, the only counsel who appeared there was Mr. *Cotton*, asking for the transfer of the funds; there was no counsel, on behalf of the family, objecting or asking the Court to exercise any discretion. Mr. *Cotton*, in support of the Petition, submitted that the case was distinguishable from that of *Re Stark* (2). There was no one there to say it was not distinguishable from *Re Stark*, or to appeal to the discretion of the Lord Chancellor, or to ask him to exercise it; but even there the report states that the Lord Chancellor, after some hesitation, made the order in the terms of the prayer of the Petition, observing that he assumed that no security had been given by the curator, and that none was required by the laws of *Holland*. Then His Lordship intimated that he should have had no difficulty in making the order if it had been shewn that the lunatic was a Dutch subject. I cannot entertain a doubt that in that case, if the property had been large, and if any one had sug-

(1) 3 Mac. & G. 234. (2) 2 Mac. & G. 174.

gested to Lord *Truro*, by whom the case was subsequently heard, that in these other cases, *Re Stark* (1) and *Re Morgan* (2), this Court absolutely refused to transfer the capital under such circumstances, especially considering that he had considerable hesitation when there was no opposition, that hesitation would have become a positive refusal.

These are the only cases really bearing on this subject, because the case of *Scott* v. *Bentley* (3) merely goes on the general question, and the case of *Hessing* v. *Sutherland* (4) does not strictly apply, because the question of discretion was not raised. It is true I have no jurisdiction in Lunacy, and I can only apply these cases by analogy.

This money has been paid in under the *Trustees Relief Act*. Have I then, under that Act, any discretion? Does it follow that any money paid in must be paid out to any one having a legal right? I have already referred to the case of an insolvency. There it was asked how much was required to pay the debts, and the Court would only order so much as was necessary for the debts, to be paid out, and the rest was to be administered by this Court according to the rights of the parties. Under Lord *Cottenham's* Act, by which moneys are paid into the Court of Chancery, what is the Court to do? It is enacted by the 2nd section that "such order as shall seem fit shall be made from time to time by the Court in respect of trust money paid in." It is the constant practice of this Court to exercise a discretion as to whether it will order money to be paid out or keep it here. I exercise such a discretion every day I hear petitions. I have, in my opinion, the same discretion in this matter. Where money was paid in under the *Trustees Relief Act*, the Lord Chancellor, sitting in Lunacy, in the cases of *Re Stark*, *Re Morgan*, and *Re Elias*, exercised that discretion.

Under these circumstances, I come to the conclusion that this money ought not to be handed out, but only so much of it as is required for the maintenance of the lunatic with reference to his condition and situation in life. It is not suggested that the capital is wanted, beyond so much as will pay a debt of £48 which has been incurred. That, of course, ought to be paid.

(1) 2 Mac. & G. 174.
(2) 1 H. & T. 212.
(3) 1 K. & J. 281.
(4) 25 L. J. (Ch.) 687.

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There had better be an affidavit on the subject; and whatever is justly due to this Petitioner for expenses incurred in the lunacy, and also the costs of this Petition, must be paid. The residue must be retained in Court, and the dividends paid to the Petitioner for or towards the maintenance of the lunatic. The Petitioner, if he wants any more money, if circumstances should arise rendering it necessary to have more of the capital, can apply from time to time, and then the Court will exercise a beneficent discretion on such a subject. It is said that it is desired to increase the dividends, and that they only produce 3 per cent. in the English funds; if need be, the fund can be put in that form of investment which will produce the highest amount of interest; but I think that is not necessary, because it is clear that, after the income has been applied, the family of which he is a member, his brother or sister, and his nephews and nieces, supply all that is wanted; and there is no evidence to lead me to entertain a doubt that this lunatic is supplied with every comfort. The order will, therefore, be to ascertain and pay what is due to the Petitioner for the costs of the lunacy and of this Petition—that is to say, any expenses properly incurred by the Petitioner in reference to the lunacy. I decline to order any further portion of the capital to be paid out, but there will be payment of the dividends to the Petitioner till further order as *curator bonis*.

Solicitor for the Petitioner: Mr. *Horwood*.
Solicitors for the Respondents: Messrs. *G. L. P. Eyre & Co.*

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Creditor—Unregistered Company—Insurance Society—Liability limited by Contract—Inability to continue Business—Damages for Breach of Contract.

An unregistered assurance society issued policies under which the assets of the company alone were liable. The company, being insolvent, was registered as an unlimited company, under the Act of 1862, and immediately afterwards ordered to be wound up :—

Held, that the shareholders were liable beyond the amount of their shares for the expenses of the winding-up ; but that there was no liability beyond the amount of the shares for any breach of contract involved in ceasing to carry on business.

THIS suit was instituted for the administration of the estate of *Mary Ann Adams*, who was at her death the holder of 200 shares in the *International Life Assurance Society*.

The society was established as an unregistered company under the name of the *National Loan Fund Life Assurance and Deferred Annuity Society* by a deed of settlement of the 16th of February, 1838, and was reconstituted under its present name by a supplemental deed of settlement of the 12th of May, 1841, which incorporated the provisions of the previous deed. By the supplemental deed the capital was fixed at 25,000 shares of £20 each.

The only clauses of the deeds of settlement which it is necessary to refer to are the 46th and the 56th of the deed of 1838.

Clause 46 was as follows: "That two successive general meetings, specially called by the directors for the purpose, shall have full power to resolve on the dissolution of the society, and to fix a day for the dissolution thereof, provided such dissolution shall have been recommended by at least two-thirds of the directors for the time being, and shall be agreed to by two-thirds of the votes of the voters and proxies present at such meetings respectively: provided always, that if at the annual meeting in 1841, or any subsequent annual meeting, the society shall appear by the ac-

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counts so to be rendered as herein provided to have sustained and incurred losses and expenses to the extent of one-fourth part of the actually subscribed capital of the society, it shall be lawful for a special general meeting to be convened for the purpose of resolving the dissolution of the society, in any of the modes hereinbefore appointed for the convening of special general meetings; and it shall be lawful for such general meeting, by a majority of the votes of the voters and proxies present thereat, to resolve on the dissolution of the society, and to fix a day for the dissolution thereof: provided always, that if at any time before the said annual meeting in 1841, the society shall have sustained losses and expenses to the extent of one-twentieth part of the nominal capital of the said society, the court of directors shall forthwith convene a general meeting for the purpose of communicating the same, and at such general meeting the said society shall be declared *ipso facto* dissolved."

Clause 56, after making other provisions relating to policies issued by the society, continued as follows: "And provided also, that in every such policy, grant, and contract there shall be contained express words for making all sums of money payable by virtue thereof, payable out of the funds and effects of the society only, and referring to the provisoes in these presents restricting the liability of the directors parties thereto, and of all other the members of the society, to the amount of their respective share of and in the subscribed capital of the society."

The operative part of the life policies granted by the society ran as follows: "Now therefore this policy of assurance witnesseth that if the said assured shall die at any time before day of 18 , or at any time thereafter whilst the payment of the sum of £ shall be duly made to the said society on or before the day of in each and every succeeding year during the life of the said assured, then the funds and property of the said society, according to the deed or deeds of settlement thereof, after satisfying all assurances granted by the society previously payable, and all other prior charges on such funds and property, shall be subject and liable to pay," &c. And the policies also contained a provision in the following words: "Provided, lastly, and it is hereby expressly declared, that no person assured by the society

shall be liable to any demand against the society, and that the funds and property of the society, according to the deed or deeds of settlement thereof, after satisfying all assurances granted by the society previously payable, and all other prior charges on such funds and property, shall alone be answerable for the payment of the moneys assured by this policy, and that no director of the society by whom this policy is executed, nor any other proprietor of the society, shall be responsible for the payment of or contribution towards the moneys assured by this policy, or liable to any demand against the society on any pretence whatsoever, beyond the unpaid part for the time being of his or her shares or share in the subscribed capital of the society, and that after the legal transfer by any proprietor in accordance with the provisions of the deed or deeds of settlement of the society of his or her shares the person to whom such transfer shall have been made, and not the transferring proprietor, shall be answerable for such unpaid part of such shares of the said capital."

The society carried on business for some time, but eventually became unsuccessful, and had lost considerably more than one-fourth of its capital. On the 8th of February, 1869, it was registered as an unlimited company; and on a petition presented almost immediately afterwards, a winding-up order was made on the 19th of February, 1869.

In the course of the winding-up the entire unpaid balance of the capital was called up; but there was a very large deficiency in the assets to pay the claims of policy-holders. The estate of Miss *Adams* had, on a claim made in the suit by the official liquidator, paid the balance of the capital on her shares, and there was now standing to the credit of the cause a further sum of about £12,000, which, except for the claim of the official liquidator, was distributable amongst Miss *Adams'* next of kin.

It was admitted that the policy-holders were entitled to have the whole available assets of the company distributed amongst them without deduction of anything for the expenses of the winding-up, and that those expenses must be met by an additional call. The official liquidator was consequently entitled to have a sufficient sum set apart before distribution of the estate to answer those charges. But he further claimed on behalf of policy-holders whose

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policies were subsisting at the date of the commencement of the winding-up, that the estates of shareholders were liable to pay the full amount of their claims, as in respect of damages for a breach of contract in ceasing to carry on business. It was estimated that this liability would amount to £69 per share, and therefore, as regarded the 200 shares of Miss *Adams*, would exhaust the whole estate.

The official liquidator accordingly applied by summons dated the 5th of January, 1870, that he might "be at liberty to go in and prove such further debt or claim, if any, as he could establish against the estate of *Mary Adams* in the pleadings named, notwithstanding the time had expired for adjudicating on debts due from the said estate."

The summons was adjourned into Court, and came on for hearing late in the day on the 16th of December, 1871. After being partially opened by Mr. *Glasse*, Q.C., it was directed to stand over part heard, and now came on again.

Mr. *Glasse*, Q.C., and Mr. *Higgins*, for the official liquidator:—

The question here is, whether in the case of an unregistered company not incorporated there can be a limitation which protects shareholders from full liability for breach of the contract into which they have entered. The question has never yet been decided. In *In re Athenæum Life Assurance Society* (1) it was only determined that in the case of companies registered under the Act of 7 & 8 Vict. c. 110, the policy-holders were limited to the amount of the assets, and the decision was based upon the construction of that Act. It is quite clear that there must be an additional call to meet the expenses of the winding-up: *In re Professional Life Assurance Company* (2); so that the only question is to what extent the call should go, and what amount should be set apart to meet it. Where a limitation of liability arises, not from the provisions of an Act of Parliament, but simply from the contract between the parties, and that contract has been broken, the limitation of liability must of necessity cease. This point was just touched upon, but not decided, in *Bell's Case* (3).

There was also a special breach of contract in going on with the

(1) Joh. 80. (2) Law Rep. 3 Ch. 167. (3) Law Rep. 9 Eq. 706, 712.

W S C 5 Jur N S 383.

concern after more than one-fourth of the capital had been lost. That is a breach of trust for which the company is liable, and it makes the individual shareholders liable also: *Evans* v. *Coventry* (1). The shareholders are liable personally except where the liability is limited by the terms of the contract, in accordance with the principles laid down by the Lord Chief Justice in *King* v. *Accumulative Life Assurance Company* (2), and by continuing business in breach of the contract the limit ceased. In order to preserve the limit they should have conformed themselves strictly to the deed of settlement: *Kearns* v. *Leaf* (3). They cannot rely upon the policy if its form is not in accordance with the deed of settlement: *Hallett* v. *Dowdall* (4).

Mr. *Cotton*, Q.C., and Mr. *Ince*, for the Plaintiffs in the suit, were not called upon.

SIR R. MALINS, V.C., after shortly referring to the facts, continued:—

The claim now set up by the official liquidator upon this summons, is one of the greatest possible importance, namely, that under the policies effected by this insurance office not a limited but an unlimited liability was created, so that if the claim succeeds every living shareholder and the estate of every deceased shareholder will be called upon to make good to the last farthing any deficiency of assets. The question turns upon the terms of the deed of constitution of the company, and the contract entered into with the assured.

The form in which the claim has been brought forward is, I must say, the most inconvenient. The official liquidator has brought it forward, not at the request of any person holding a policy, but acting upon what he has conceived to be his duty as representing the interests of the creditors, or because he thought it was a claim which ought to be brought forward. If it was a claim capable of being sustained, being on behalf not of those whose policies have dropped, but those whose policies are still in existence, it seems to me that the question ought to have been raised by a bill filed

(1) 5 D. M. & G. 911; 8 Ibid. 835.
(2) 3 C. B. (N. S.) 163.
(3) 1 H. & M. 681.
(4) 18 Q. B. 2.

(5 Sc 3 Jur N.S. 1225.

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by some policy-holder on behalf of himself and all other policy-holders against the representatives of Miss *Adams* or any other Defendants they might fix upon, and stating in distinct terms the grounds on which the claim was to be sustained. The inconvenience of the present course is sufficiently shewn by the fact that many circumstances relied upon in support of the claim are not in evidence, and I could not admit this claim without proceeding on assumptions of facts which may be erroneous.

I desire, however, to decide the case on broad principles.

The object of the deed of settlement is perfectly clear. The question turns chiefly on the 56th clause. [His Honour read that clause, and continued:—] That was the protection the proprietors threw around themselves by the deed of settlement, and it was made imperative upon the directors to insert a clause in every policy restricting the liability of the directors parties thereto and all other members of the society. The official liquidator, representing all creditors, says there are many still alive who have policies on their own lives, or who have policies on the lives of other persons still living; and the form of a policy is handed up to me. [His Honour read the proviso above set out, and continued:—] Nothing can be more distinct or emphatic than the terms of this contract: "No individual proprietor of the company shall be liable on any pretence whatever beyond the unpaid part of his share in the capital of the society."

Now the assets of the society consist, in the ordinary sense of the words, of all its property and all that can be obtained by calls from its shareholders. The contract is that each shareholder shall be liable for £20 per share, and not for a single farthing beyond that; and this estate having paid that amount the contract is that there shall be no liability to pay more. This is limited liability, which is now established by Act of Parliament as part of the law of the land; but before it existed by Act of Parliament it could exist by contract, and the policies of these insurance offices were instances of limited liability by contract. For if a person takes a policy which on the face of it says that his right is not against the individual shareholder, but that he is to look to the assets of the company only, that is a contract for limited liability, and the person who takes such a policy accepts the

liability of the assets only. So there may be limited liability in this manner: Two men may enter into a contract to have work done for them to any amount whatever, and that each of them shall only be liable for one half the amount. That would be limited liability, and an instance of the kind was put by Vice-Chancellor *Wood* in *In re Athenæum Life Assurance Society* (1), that of a contract that a person shall be paid out of a particular fund, such as the produce of a particular cargo of goods. That would also be limited liability.

Then where there is a contract for limited liability will the Court enforce unlimited liability. Now the authorities are uniform on the question. Mr. *Glasse* was kind enough to draw my attention to some of the more prominent cases, particularly that of *In re Athenæum Life Assurance Society*, which, not for the first time, raised the very question which is raised here. The Vice-Chancellor, after mentioning several cases in which the question had been raised at common law, and stating the way it had been urged, says (2): "That is an ingenious way of putting the argument; but the answer to it is, that this is not a contract by an ordinary partnership; this is the case of a contract by a joint stock company, incorporated under the Act of 7 & 8 Vict. c. 110; upon such a contract there is no right of proceeding against individual members of the company, except such as may be given by the Act under which the company was registered; and, according to Lord *Denman's* decision in *Halket* v. *Merchant Traders Insurance Company* (3), the rights given by that Act against individual members of a company are limited to the extent of their liability, as defined by the contract into which they have entered." Accordingly he decided the question for the second time, the same point having been before him in *Durham's Case* (4); and the Court of Queen's Bench in *Halket* v. *Merchant Traders Insurance Company*, and the Court of Exchequer in *Hassell* v. *Merchant Traders Insurance Association* (5), had also expressly decided it. In the former of these cases the application was for liberty to take out execution against the individual shareholder notwith-

(1) Joh. 80. (3) 13 Q. B. 960.
(2) Ibid. 85. (4) 4 K. & J. 517.
(5) 4 Ex. 525.

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standing the provision for limited liability, and Lord *Denman*, in an elaborate judgment, gave a decision that as the parties had entered into a contract for limited liability, the Court would not permit them, in defiance of their own contract, to take out execution against an individual shareholder to enforce payment of anything beyond the subscribed capital. *Durham's Case* (1) was in the same *Athenæum Life Assurance Society* (2), and there the same point was carefully considered by the present Lord Chancellor, and it was held that the terms of the policy precluded the assured from any remedy at law against an individual shareholder, and that even if upon the company's deed of settlement the policy was in that respect less favourable to the assured than the deed required, if that were the case that circumstance could not be insisted on for the benefit of the assured, his rights being defined by the contract into which he had entered, and that assuming the mention in the policy of the capital stock of £100,000 to be equivalent to a representation that the society's capital actually amounted to that sum, and to be a fraud on the part of the directors, the capital subscribed for at the date of the policy not exceeding £44,000, that circumstance would not entitle the assured to have execution against an individual shareholder.

That part of the case disposes of much of the argument which I heard.

There is not a single case at law or in equity that gives the faintest semblance of authority to the claim set up in this summons. The cases at law and in equity are uniform, that wherever under a policy of assurance there is a contract that the assured are to look to the assets and property of the company only, they are to look to the individual only to the extent of the calls on his shares, and that there is no power either in a Court of Law to take out execution beyond the amount of the call, nor in equity to enforce a liability beyond that amount. All such attempts have hitherto signally failed; and I think I should be most unwarranted, on an application by an official liquidator, not instigated or requested by a single policy-holder to enter into this litigation, to make a decision in contradiction to that long series of well-settled authorities, which are, moreover, in my judgment, rightly decided.

(1) 4 K. & J. 517. (2) Joh. 80.

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Ex parte LIQUIDATOR OF THE INTERNATIONAL LIFE ASSURANCE SOCIETY.

Those who enter into contracts for limited liability cannot turn their contracts into unlimited liability unless they shew fraud or something entitling them to go out of their contracts.

Many further topics have been urged. It has been said in particular that the directors when they lost one-fourth of the capital ought to have wound up the business. Probably that is correct, and the directors may be responsible. Some idea was suggested at one period of the winding-up of endeavouring to establish that case against them. It may have been exceedingly reprehensible for the directors to have continued the business; but on such a summons as this, when I have not the facts before me, it is impossible for me to enter into considerations of that kind. I can only look at this as a claim, and finding that £20 per share has been paid by this estate, hold that there is no further liability to the policy-holders.

It was then arranged that £1400, or £7 per share, should be retained to provide for the costs of the winding-up, and the costs of the application were ordered to be paid out of the estate of the society.

Solicitors: Mr. *John Tucker;* Messrs. *Hird & Son.*

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[1870 C. 188.]

Mortgage by an Executor to a Building Society—Sale under Power.

An executor effected a mortgage of leasehold property, for executorship purposes, with a power of sale, to a building society, to secure the repayment of the money advanced, as well as all fines, premiums, and interest on certain advanced shares in the society, taken by the executor for the purpose of obtaining the loan:—

Held, upon bill filed by the society against a purchaser under the power of sale, for specific performance, that the executor might legally effect a mortgage with power of sale and with the incidents of a building society mortgage on advanced shares.

20 Ch D. 147

THIS bill was filed by the trustees of the *Temperance Permanent Building Society* against *J. C. Duffin* for the specific performance

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of an agreement, signed by the Defendant, for the purchase of certain leasehold houses, which were sold by auction, by the direction of the building society, on the 14th of April, 1870, and were then purchased by the Defendant for the sum of £515.

The Defendant was willing to complete his purchase if the Court should be of opinion that the title was good.

The property in question was sold, under a power of sale contained in a mortgage to the society, by *Joseph Amos*, dated the 28th of January, 1869.

This deed recited a lease of the premises to one *Jacob Amos*, and the will of *Jacob Amos* appointing *Joseph Amos* and *J. Dawes* his executors, and the death of the testator and the proof of the will by *Joseph Amos* alone; and that the mortgagor, being desirous of borrowing £450 for the purposes of the executorship, had applied to the directors of the society to lend him that sum in respect of fifteen advanced shares in the society for the term of twelve years, and had proposed to assure the premises to the trustees to secure the repayment of such sum, in accordance with the rules of the society, and had also offered to pay a premium for such advance, which, being calculated according to such rules, amounted, for the said term of twelve years, to the sum of £47 5*s*., and, according to such rules, was to be added to and treated as part of the principal sum so advanced; and thereby *Joseph Amos* covenanted to repay the money so advanced, with premium and interest thereon, by monthly instalments of £4 13*s*. 5*d*. per month, extending over a term of twelve years; and the mortgage incorporated the rules of the society, whereby the mortgage could be redeemed at any time on payment of the balance of the principal due, with interest thereon, and all fines due in respect of these shares, and all moneys due or to become due from the mortgagor in respect of any other shares in the society, and of the current year's premium on the shares held in the society.

Jacob Amos, the testator, in his lifetime had executed securities to the trustees of another society called the *Southwark Building Society*, and these securities had either been discharged by him in his lifetime or by his executor after his decease. *Joseph Amos*, as such executor, had, very shortly after the death of *Jacob Amos*, executed other securities over two of the houses now forming part

of the property in favour of the *Southwark Building Society*, to secure advances made to him, and it was for the purpose of paying off such securities, and for the payment of the testator's debts and funeral and testamentary expenses, and to enable him, as executor, to do certain repairs to the houses in pursuance of covenants in the leases thereof, that he obtained this money from the *Temperance Building Society*.

Joseph Amos was not only executor of *Jacob Amos*, but he was also tenant for life, under the testator's will, of a portion of these houses, and the consent of the other tenant for life was obtained to his borrowing the money from the *Temperance Society*.

Mr. *Cotton*, Q.C., and Mr. *Osler*, for the Plaintiffs:—

This is a case of a novel description, being a mortgage by an executor to a building society, and although such a mortgage may never before have been questioned in this Court, it is not an unusual occurrence, and there can be no more objection to it than to an ordinary mortgage. It was at one time held that an executor had no right to give a mortgage with a power of sale; this was decided in *Sanders* v. *Richards* (1); but that case was overruled by the Master of the Rolls in *Russell* v. *Plaice* (2), which was followed by the Lords Justices in *Earl Vane* v. *Rigden* (3), and by this Court in *In re Chawner's Will* (4). It may now be considered as settled law that an executor may give a power of sale. This is also consistent with the requirements of modern practice, since it is found that money cannot be obtained on mortgage without such power of sale. The only difficulty, therefore, is the fact that this mortgage is made to a building society, and by the rules and constitutions of the society the person to whom the money is lent becomes liable for the payments which he himself is bound to make to the society on his own account. This objection has, in fact, no validity, because the executor is merely covenanting to pay, in the shape of premiums and fines to the society, what he would be bound to pay to an ordinary mortgagee; and if he undertakes to pay personally these premiums and fines, it is only an increase of liability on his part which he had a right to incur if he pleased. The executor

(1) 2 Coll. 568.
(2) 18 Beav. 21. 16 Jur 255
(3) Law Rep. 5 Ch. 663.
(4) Ibid. 8 Eq. 569.

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was justified in raising money by these means. It was necessary that the money should be obtained for executorial purposes, and it would have been difficult, if not impossible, to get an advance in any other way. The testator himself adopted a similar course during his life, and mortgaged a part of this same property to another building society, and his executor only pursued the plan pointed out by his testator, and this with the sanction of the only other persons interested in the property.

Mr. *Glasse*, Q.C., and Mr. *Lindley*, Q.C., for the Defendant:—

The first objection raised to the completion of this purchase is, that the mortgage by *Joseph Amos* to the building society was not such a security as, in his character of executor, he was justified in giving. It was made for securing payment of certain annual sums payable by him in respect of shares held by him in the society. The mortgage therefore amounts to a forfeiture by *Joseph Amos* of his interest under his father's will in the two houses. It is stated that he required the money for the purpose of effecting certain repairs to the buildings, and this is not legitimately an executorship purpose. *Joseph Amos* was only tenant for life of the property, and this fact was known to the building society. As such tenant for life he was bound himself to do a portion of the repairs. Then the mortgage is not made for the purpose of securing a specific sum advanced to the executor, but for securing the repayment during a period of twelve years of the monthly subscriptions and fines payable in respect of fifteen shares held by him in the society; and even assuming that he had occasion to borrow money for the purpose of his executorship, he was not justified in making the property a security for payment of monthly subscriptions and fines which he, and not the testator, was liable to pay. This is simply a breach of trust, and the case cannot be affected by the authorities cited. *Sanders* v. *Richards* (1) has not been overruled in this respect, that in the absence of the party beneficially interested in the property, the Court will not force upon a purchaser a title derived under a power of sale given by an executor; and in *Webb* v. *Kirby* (2), where there was a sale of leaseholds by order of an executor, and where the property was in fact sold by the adminis-

(1) 2 Coll. 568. (2) 7 D. M. & G. 376.

trator *de bonis non* of the testator *durante absentia* of his next of kin, it was held, that although a sale during the lifetime of the absent principal would have been valid, yet, as the principal might at the time of the sale have been dead, the title was not such as the Court would compel a purchaser to accept. This is the first time the Court has heard of a mortgage by an executor to a building society. It is an extension of business not coming within the objects of such societies, and the peculiar circumstances of this case render the title such as no purchaser can be bound to take.

Mr. *Cotton*, in reply, cited *Alexander* v. *Mills* (1).

SIR R. MALINS, V.C.:—

This is a bill for the specific performance of a contract to buy a leasehold house which was put up for sale by public auction on the 17th of April, 1870, by the Plaintiffs.

There is no question as to the general title, which is admitted, I understand, to be good. The whole question turns upon the validity of the power of sale under which the Plaintiffs sold the property.

The property belonged to one *Jacob Amos*, who died some time ago, and appointed his brother *Joseph Amos* his executor. The mortgage in question was executed by the executor, *Joseph Amos*, and contains a power to sell under which the property has been put up for sale, and under which it is now proposed to make the title. The question is, whether the power of sale is a valid power. If it is, then there must be a decree in favour of the Plaintiffs. If it is an invalid power, then the bill must be dismissed.

Is this, then, or is it not a valid power of sale? That the same power which grants a mortgage of property may create a power of sale, is not disputed by the Defendant's counsel. It is very true that it was formerly held by the Vice-Chancellor *Knight Bruce*, in the case of *Sanders* v. *Richards* (2), that where a power of sale was given by an executor upon a mortgage, the title under that power of sale could not be forced upon a purchaser. That case, I find, was cited by Lord *St. Leonards* in his Treatise on Vendors and Purchasers, in the last edition, as an authority. But I think

(1) Law Rep. 6 Ch. 124. (2) 2 Coll. 568.

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(indeed the learned counsel for the Defendant has not disputed it) that the doctrine laid down in that case can no longer be maintained as the rule of the Court, for in the case of *Russell* v. *Plaice* (1) the Master of the Rolls decided directly the contrary, namely, that a good title could be made under a power of sale created by an executor.

That case of *Russell* v. *Plaice*, having been cited before the Lord Chancellor and the Lords Justices in the case of *Earl Vane* v. *Rigden* (2), was commented upon by the Lord Chancellor, who expressed his approbation of it, and I therefore think it may be considered as a binding authority upon the point.

There is another case, before myself, of *In re Chawner's Will* (3), in which I was applied to under Lord *St. Leonard's Act* to give the opinion of the Court whether an executor could, in creating a mortgage, properly give a power of sale. I there held that he might; and in doing that I acted on what is the universal understanding of the profession, that in every mortgage there must be a power of sale, for otherwise the money is hardly obtainable. I think, therefore, it must now be considered as settled that there is no objection to an executor giving a mortgage with power of sale.

The objection relied on is, that the mortgage is in the usual form of a mortgage to a permanent benefit building society. The general constitution of those societies is well known in this Court, but this is the first case I have seen in which an executor, for the purpose of the executorship, has become a member of such a society. It appears that the executor in taking this course was not doing what he supposed would be disapproved of by his testator, for I find the testator, having leasehold property, became a member of the *Southwark Permanent Benefit Building Society*, and in 1860 mortgaged this very property, or a part of it, to that society, in consideration of certain advanced shares. The meaning of advanced shares is well understood. A man subscribes for a certain number of shares. He has certain monthly instalments to pay on them, and certain fines in default of payment; upon paying his instalments and any fines which he may have become subject to, he becomes a member and entitled to be advanced.

(1) 18 Beav. 21. 18 Jur. 255 (2) Law Rep. 5 Ch. 663.
(3) Law Rep. 8 Eq. 569.

This testator was advanced the sum of £345 by the *Southwark Society*. He then executed a mortgage in the usual form, precisely to the same effect as this, namely, to secure payment of the fees and monthly instalments, and any fines to which he might become subject by their non-payment. In the case of every mortgage carrying interest half-yearly, after the time for redemption is over, the mortgagor can redeem his mortgage by paying the mortgagee six months' interest for want of notice. So, in this case, the mortgage, being in the form I have stated, is redeemable at any time by payment to the society of the amount remaining due together with interest for the current half-year. That, therefore, is a form of mortgage which I cannot regard as being objectionable, and which certainly would not raise any fatal objection to the validity of the transaction.

The amount of interest secured to the society is not complained of, considering the nature of the property. It is about $6\frac{1}{3}$ per cent., which I cannot consider, with reference to this kind of property, as an inordinate amount of interest, and indeed no objection has been taken on that ground.

There was an objection taken which at first struck me as being of serious importance, namely, that this deed is made a security not only for the repayment of whatever may become due from the borrower, *Joseph Amos*, in his capacity as executor, but also any sums of money which may be due from him individually if he subscribed for other shares in this society. That at first struck me as very objectionable, for this reason: the mortgage recites the lease and it recites the will, and then it says that the £450 mortgage money is borrowed for the purpose of the executorship. It is therefore distinctly shewn on the face of the deed that this property is trust property which the executor is dealing with as a trustee, and then the ordinary rules of this Court make it absolutely impossible that an executor can give a security upon trust property for his own individual debt. The truth is that that clause was allowed to remain in because it is a clause usually inserted where persons take shares in their own individual capacity or in their own individual right. But it being perfectly clear that it could only be a security for that which was borrowed by him as executor, I think that is an inoperative clause,

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destroyed by the contents of the deed itself, and that that objection to the power of sale is entirely removed.

That being out of the way, what are the real objections to this power of sale? I say again this is the first instance I have known of an executor in his executorship capacity becoming a member of one of these societies. It did for some time strike me that there were serious objections to it; but when it comes to be looked at I do not find there is much in it. This is a kind of property on which there would very likely be considerable difficulty in borrowing money. It is an important circumstance that when the testator wanted money he himself resorted to a building society. Why, then, should his executor not do the same? It may have been a foolish thing on the part of the executor to render himself individually liable for these fees and fines. It may be a very foolish thing for the executor to enter into a covenant to pay money which no executor in creating a mortgage would ordinarily render himself personally liable by covenant to pay; but if he chooses, in creating a mortgage, to render himself individually liable, no one would say that that is an objection to the mortgage, or an objection to the power of sale which it contains. The result is, that this executor, having property in his hands which I must assume he felt confident would be an indemnity to him, becomes a member by taking a certain number of shares in this society by which he becomes liable for certain monthly payments. He says, "I have the property to resort to; there is the power of sale, and I do not mind incurring that risk. Therefore I will individually become liable to pay these instalments. I can at any time redeem by paying half a year's interest, and that is a risk which I am willing to run."

Therefore, although this is a building society, I come to the conclusion that I can look at it as a mortgage with a power of sale which does not arise in any unreasonable way, and which can only be exercised in default of payment of the instalments. It is a power exerciseable in the same way as powers of sale which are contained in ordinary mortgage deeds. It being considered that an executor may in general create a mortgage with a power of sale, I have only to look upon the whole transaction as an ordinary mortgage with a power of sale.

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For the reasons I have stated, I do not think there is any substantial objection to it. Although it is the duty of the Court to give every due weight to objections to title, and to be very careful that it does not force upon a purchaser a title which he may not be able to hold, yet, upon the other hand, I think it is equally important that persons who enter into these kind of contracts should be compelled to perform them. The case of *Alexander* v. *Mills* (1) has been mentioned, which was decided by the Lords Justices, in which I am glad to see that they have shewn an inclination not to give way to frivolous objections to title.

I think this is an objection which has no substantial foundation, and upon the whole I come to the conclusion that the power of sale is well created and has been well exercised, and that there must be a decree for specific performance.

Upon being asked to order the costs to be paid by the Defendant, His Honour said:—

There is great difficulty as to costs between vendors and purchasers, and Vice-Chancellor *Knight Bruce* used to say, when a purchaser's objections to title failed, that, for the sake of the title, he ought to pay the costs; but this is an important question, and the point is a novel one, upon which my opinion has undergone considerable fluctuation during the argument. I cannot say that I think it so unreasonable an objection that I ought to make the purchaser pay the costs of the suit; besides which the building society will have the benefit of it, for if my decision stands, they will have the satisfaction of knowing that they may take such mortgages in future. There will be a declaration that the power of sale has been well exercised, with a decree for specific performance, and no order as to costs.

Solicitors for the Plaintiffs: Messrs. *Shaen, Roscoe, & Massey.*
Solicitors for the Defendant: Messrs. *F. & E. Chester.*

(1) Law Rep. 6 Ch. 124.

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In re REASTON'S ESTATE.

Practice—Lands Clauses Act, s. 78—Trustees for sale—Persons absolutely entitled.

Semble: Trustees for sale whose *cestuis que trust* are under disability, are not persons absolutely entitled within the meaning of sect. 78 of the *Lands Clauses Act.*

THIS was a Petition for payment out of Court of a sum of £633 11*s.* 2*d.* consols, paid into Court under the 69th section of the *Lands Clauses Act* and representing the purchase and compensation money of certain land which had been taken by the *North-Eastern Railway Company* under that Act.

The land taken by the company was part of an estate devised by the will of *William Reaston,* which was dated the 24th of March, 1854, to trustees upon trust to pay the income (subject to certain charges) to his son *Benjamin Reaston,* for life, and then upon trust for sale, and to divide the proceeds amongst such of the children of *Benjamin Reaston* as should attain the age of twenty-four years. The land was taken during the lifetime of *Benjamin Reaston.*

Benjamin Reaston died on the 5th of January, 1871, leaving six children, four of whom had attained the age of twenty-four years, and two were still infants. The trustees had, since his death, sold the residue of the estate, and divided the proceeds of the sale in such manner that the fund in Court represented part of the shares of the two children who were under age.

All the children and the trustees were Petitioners. The Petition prayed in the alternative either that the fund might be paid out to the trustees, as persons absolutely entitled under the 78th section of the Act, or be carried over in moieties to the separate accounts of the infant children.

There was also a question as to the rule against perpetuities, which was waived by the parties interested.

Mr. *Wiglesworth,* for the Petitioners:—

There is a conflict of authority as to whether trustees are, under

these circumstances, persons absolutely entitled within the meaning of the Act. Vice-Chancellor *Stuart*, in *In re Horwood's Estate* (1), refused to make an order for payment to trustees; but the Master of the Rolls appears to have entertained a different view, and in a matter of *In re Illman's Will* which came before him on the 2nd of July, 1870, he allowed a fund to be transferred to trustees.

Mr. *G. Williamson*, for the company:—

The present case is distinguishable from *In re Horwood's Estate*. There the tenant for life was still living, and the trust for sale had not become capable of being exercised, but in the present case the trust for sale has come into operation, and it is only by the accident of this portion of the estate having been previously taken by the company that the shares of these infants are not represented by a fund invested in the names of the trustees.

Sir R. Malins, V.C.:—

I think the safer course will be to carry the fund to the separate accounts of the infants, and direct the payment of the dividends to the trustees. Liberty may, however, be given to apply in Chambers for payment of the capital when it becomes payable.

Solicitors: Messrs. *Ridsdale, Craddock, & Ridsdale;* Messrs. *Williamson, Hill, & Co.*

(1) 3 Giff. 218.

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1872
Feb. 16;
March 2.

In re HERCULES INSURANCE COMPANY.

PUGH AND SHARMAN'S CASE.

Contributory—Misdescription—Application in Name of Married Woman—Depositions under s. 115 *of the Companies Act*, 1862.

S., who was a large shareholder in a company, wished to take more shares, but the directors refused to allow his name to appear for any larger number. He then, at the suggestion of the secretary and with the concurrence of a local agent of the company, sent in an application for shares signed by his daughter *P.*, a married woman residing elsewhere, but then on a visit to him. Her condition was not stated in the application, and the father's residence was given. The deposits on application and allotment were paid by *S.*, and he received the notice of allotment and a dividend which was paid, and all the notices relating to the company, which were posted to *P.* at his address. *P.* signed the application without being informed or knowing what it was, and never told her husband anything about it, and neither of them knew she was on the list till an application was made by the official liquidator:—

Held, that the case was similar to that of an application for shares in the name of a fictitious person, and that the name of *S.* must be substituted for *P.* in the list of contributories.

An application for shares in a false name puts a man in the same position as regards liability, as a transfer into a false name.

Depositions taken under the 115th section of the *Companies Act*, 1862, may be used as evidence on a summons against the party by whom they have been made; but, *semble*, notice of the intention to read them should be given.

THESE were two summonses, the first being by Mr. and Mrs. *Pugh* to take the name of *Mary Pugh* off the list of contributories for 400 shares in the *Hercules Insurance Company*, and the second being by the official liquidator to place the name of Mr. *Sharman* on the list for the same shares.

The company was constituted in its latest form by being registered in December, 1865, under the *Companies Act*, 1862, and Mr. *Sharman*, who was the holder of a large number of shares in the company out of which it was formed, took in substitution, in his own name and that of his son, 806 shares in the new company, involving about an equivalent liability. He then applied for 400 shares in addition, but the directors declined to allow any greater number to be placed in his name. Mr. *Shrubb*, the secretary to the com-

pany, then suggested that he should apply for the shares in the name of his daughter *Mary Pugh*, who was the wife of *Samuel Sargent Pugh*, a Baptist minister at *Devizes*.

Mrs. *Pugh* happened to be staying with her father, at *Leighton Buzzard*, on the 6th of January, 1866, and on that day Mr. *Elliston*, who was the agent of the company at *Leighton Buzzard*, requested her to sign a paper which he produced, and which was in fact an application for 400 shares in the company. It appeared that the request was made either in the presence of or with the concurrence of Mr. *Sharman*, and Mrs. *Pugh* readily signed the paper, without inquiring what it meant, knowing that it was her father's wish that she should do so. The facts of the case were elicited by examining the parties before a special examiner, under sect. 115 of the *Companies Act*, 1862. Mrs. *Pugh*, in her examination, stated in effect that she knew nothing about the *Hercules Company*, and had no intention of applying for shares in her own name, and that she did not inform her husband of her having signed the paper. Neither she nor her husband knew that she was on the list of members of the company till an application was made by the official liquidator in the winding-up.

The application for shares was as follows:—

"To the Directors of the *Hercules Fire, Life, and Marine Insurance Company.*

"Gentlemen,—Having paid to your bankers the sum of four hundred pounds, being one pound per share on account of four hundred shares of ten pounds each in the above company, I request that you will allot me that number, and hereby agree to accept such shares, or any less number that may be allotted to me, and to pay the further sum of one pound per share on allotment, and the balance when called for. I further request that my name may be placed on the register of shareholders, and I will sign the articles of association.

"Name in full, *Mary Pugh.*
"Residence, *Leighton Buzzard.*
"Profession or occupation.
"Dated this sixth day of January, 1866.
"*Mary Pugh*, Signature."

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This document was, except the signature, entirely in the handwriting of Mr. *Elliston*. The deposit of £400 was really paid by Mr. *Sharman*, and he also paid the sum of £400 on allotment of the shares. All the communications from the company relating to the 400 shares, including the notice of allotment, were addressed to Mrs. *Pugh, Leighton Buzzard*, and received by Mr. *Sharman*, and none of them were forwarded to her, and a dividend on the shares was paid to Mr. *Sharman*. He stated, however, that he had paid it over to her as part of a larger sum, but it did not appear that he explained to her how this larger sum was made up, or gave her any information with respect to the shares.

The company was ordered to be wound up, and the official liquidator, finding that 400 shares were standing in the name of *Mary Pugh*, placed her on the list of contributories for the same shares.

Mr. *Cotton*, Q.C., and Mr. *E. S. Ford*, for the official liquidator, were proceeding to read the depositions of Mr. *Sharman*, when Mr. *Higgins*, Q.C., and Mr. *Tweedy*, who appeared for him, objected to their being read. The question of the right to read them was then argued.

Mr. *Higgins*, Q.C., and Mr. *Tweedy*, for Mr. *Sharman*:—

Sect. 115 of the *Companies Act* is merely intended for the purpose of obtaining discovery from the officers of the company, and other persons, and the result of the information obtained under it is not necessarily evidence, and if the party examining desires to make it evidence he must do so by some means which will allow of cross-examination by the party against whom it is to be used.

Sir R. Malins, V.C., without calling upon the counsel for the official liquidator:—

I am of opinion that the evidence taken under the 115th section is capable of being used against the person who gives it. The 115th section is this: "The Court may, after it has made an order for winding up the company, summon before it any officer of the company, or person known or suspected to have in his possession any of the estate or effects of the company, or supposed to be indebted to the company,"—which is the case here, because

Mr. *Sharman* is supposed to be indebted for shares taken in the name of another person incapable of binding herself—"or any person whom the Court may deem capable of giving information concerning the trade, dealings, estate, or effects of the company, and the Court may require any such officer or person to produce any books, papers, deeds, writings, or other documents in his custody or power relating to the company;" and if any person refuses to attend, then the Court may cause such person to be apprehended and brought before the Court for examination. It appears to me that the obvious object of that section is to enable the Court to obtain discovery from any person who is indebted to the company, or under any obligation to it, or who has any portion of its property in his possession. It would be a vain thing to have a person examined, and then to allow an objection to prevail that the evidence is incapable of being used. That is the objection here, that this gentleman, who applied for shares in the name of his daughter, a married woman, incapable of binding herself or her husband, may be summoned to give evidence, and that no use can be made of the evidence when given. I do not think the Legislature intended this result, and therefore I think that the evidence is admissible.

The matter then stood over on the application of Mr. *Higgins*, in order that formal notice might be given to read the depositions.

March 2. Mr. *Cotton*, Q.C., and Mr. *E. S. Ford*, for the official liquidator:—

This is like an application by a person under a false name, or under the name of a non-existent person. There is, in fact, a false name and a false address, for there was no such person as *Mary Pugh*, of *Leighton Buzzard*, and no such person as *Mary Pugh* capable of taking shares. The Court has power to put the real owner of the shares on the list, as in *Musgrave and Hart's Case* (1) and will remove the name of a fictitious person. This was done by Vice-Chancellor *James* in *Nickalls* v. *Furneaux* (which came before His Honour on May 6th, 1869), where a similar point arose.

(1) Law Rep. 5 Eq. 193.

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Mr. *Higgins*, Q.C., and Mr. *Tweedy*, for *Sharman* :—

Nickalls v. *Furneaux* was a suit for an indemnity, and no doubt as between a transferor and transferee the Court may substitute the name of a transferor for that of a transferee, as in *Musgrave and Hart's Case* (1). But a company guilty as this is of fraud and laches cannot come to rectify the register under sect. 35 of the *Companies Act*: *Sichell's Case* (2). Mr. *Sharman* wished to take the shares in his own name, but was told he could not do so, and the company cannot now turn round and say that he was a shareholder. The creditors had no representations held out to them that Mr. *Sharman* had taken the shares, and the company was bound, in allotting the shares, to know the name, address, and occupation of the allottee. It is of the essence of a case of rectification that the name should appear on the list of shareholders: *Wright's Case* (3). It is not certain that a married woman cannot contract: *Mrs. Mathewman's Case* (4). If a man applies in the name of a pauper he cannot be settled on the list.

[They also referred to *A. Levita's Case* (5), *G. H. Levita's Case* (6), *Ex parte Bugg* (7), and *Western Bank of Scotland* v. *Addie* (8).]

Mr. *Pearson*, Q.C., and Mr. *Warmington*, for Mr. and Mrs. *Pugh* :—

The first notice Mrs. *Pugh* had of being a shareholder was when she found herself placed on the list of contributories; and whatever happens, it is certain that her name must be taken off the list.

Mr. *Cotton*, in reply :—

It is clear that Mr. *Sharman* applied for the shares for his own benefit. This is not a contract by Mrs. *Pugh* to take shares for Mr. *Sharman*, but a contract by Mr. *Sharman* to get the shares for himself by using the name of Mrs. *Pugh*; and it may be questioned whether *Mary Pugh*, of *Leighton Buzzard*, was an existing person.

Sir R. Malins, V.C., after stating and commenting on the facts, continued :—

Nothing can be more clear to my mind than that Mr. *Sharman*

(1) Law Rep. 5 Eq. 193.
(2) Ibid. 3 Ch. 119.
(3) Ibid. 7 Ch. 55.
(4) Ibid. 3 Eq. 781.
(5) Law Rep. 3 Ch. 36.
(6) Ibid. 5 Ch. 489.
(7) 2 Dr. & Sm. 452.
(8) Law Rep. 1 H. L., Sc. 145.

intended to become the owner of these shares, and to derive from them all the benefits which they could give. Under these circumstances, I think it is perfectly clear that the name of Mrs. *Pugh* must be taken off the list of contributories, and the question to be decided is whether Mr. *Sharman* ought to be put on the list. Here is a man who desires to become a shareholder in a company. He is perfectly at liberty, if he thinks fit, to take the shares in the name of a trustee; and if he had any friend or agent capable of binding himself, nothing is more clear than that he would be entitled to take the shares in the name of the friend or agent, whose name would be put upon the register, and the company, looking only at the register, could not have resorted to Mr. *Sharman*.

That, however, would only be an escape in form, for the trustee could, in the fullest manner, require Mr. *Sharman* to indemnify him for all calls which he might be liable to pay. In *Hemming* v. *Maddick*, which is now before the Court of Appeal (1), I expressed my view of the law upon the point; and there is no doubt that if Mr. *Sharman* had taken the shares in the name of a trustee he would have been liable to pay indirectly, though not directly, to the company. He, however, chooses to use the name of his daughter, who was as incapable of contracting as if she had been an infant, and who, it is perfectly clear, could not have taken the shares.

It is very remarkable that the point has not arisen before, whether a man is liable to be treated as the owner of shares by applying for them in a false or fictitious name; for I must treat this as a false or fictitious name. I must attribute to Mr. *Sharman* the knowledge that his daughter, being a married woman, was incapable of contracting, and I must add that his conduct in describing her as of *Leighton Buzzard* was grossly improper. That was a deception practised upon the company, and the agent of the company, who was perfectly well aware of the facts, was also guilty of gross impropriety in sending in the application.

Now, although he was the agent of the company, he was not such agent for the purpose of committing this fraud, but simply for obtaining *bonâ fide* applications for shares; and I cannot attribute to the company at large any share in the misrepresentation of which he or Mr. *Shrubb*, the secretary of the company, was

(1) Since affirmed, Law Rep. 7 Ch. 395.

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guilty in this transaction. It is perfectly clear that if Mr. *Sharman's* name had been on the register, and he had desired to get rid of his liability, and had made a transfer on the 6th of January, 1866, into the name of his married daughter, such a transfer would have been wholly inoperative, and he would have remained a contributory notwithstanding the transfer. In my opinion there can be no difference between a fraudulent attempt to get rid of liability by a transfer of shares, and a fraudulent attempt to obtain shares by taking them in a false or fictitious name. A man who applies for shares, and intends to make himself the owner of them, is, in the language of the 23rd section of the *Companies Act*, 1862, a person who agrees to take shares, and he becomes a contributory. I think, on general principles, that Mr. *Sharman*, by applying for shares in the fictitious name of his daughter, is as liable to take the shares as if he had taken them in his own name. I call Mrs. *Pugh's* name fictitious, because Mr. *Sharman* knew perfectly well that she could not bind herself. If he had applied in the name of a person capable of contracting, the case would be different.

One of the grounds of defence was, that the company was guilty of fraud. The company may have been guilty of the grossest fraud, but I take it to be perfectly clear since the case of *Oakes* v. *Turquand* (1), that where there is a question of whether a man is a contributory or not, no misconduct of the company, or false representation or misrepresentation made by them as a means of inducing him to take shares, will relieve him from bearing the responsibility which he, at all events, owes to creditors, whatever effect it may have as between himself and other shareholders. In the present case creditors, to a large amount, remain unpaid, and I consider that Mr. *Sharman's* name ought to have been on the list for these shares since 1866, and I feel it my duty to put it on now.

Then it is said that there are several cases bearing on the point, and *Sichell's Case* (2) was mentioned, but I think it has no application to this case. In it the name was, I think, for a short time on the register, but was taken off by a binding contract before the winding-up.

(1) Law Rep. 1 H. L. 325. (2) Law Rep. 3 Ch. 119.

Mr. *Cotton* :—There was a transferee whom the company refused to put on.

The VICE-CHANCELLOR :—Yes. That being the case, the company, having refused to put the name on, could not turn round and insist upon its going on. *Levitas' Cases* (1) have no application that I can see. There was an arrangement to take the shares. Both the *Levitas* were put on the register, and agreed to take the shares: in one case one of them appointed *McHenry* his agent to accept the shares, and he had done so.

It therefore appears to me that I must deal with the whole transaction precisely as if Mr. *Sharman* had been originally put upon the list of contributories, and he had attempted to get rid of his liability by transferring the shares into the name of a person who was incapable of accepting such a transfer. By the result of the transaction he would have taken the benefit of any advantages arising from the shares, and I must make him a shareholder from the beginning. I must consequently accede to the two applications, and remove the name of *Mary Pugh*, and substitute for it that of Mr. *Sharman*. Mr. *Sharman* will have no costs, and the costs of Mr. and Mrs. *Pugh* will come out of the estate.

Solicitors: Messrs. *Merriman, Powell, & Co.*; Mr. *T. C. Russel*; Messrs. *Robson, Tidy, & Herbert.*

(1) Law Rep. 3 Ch. 36; 5 Ch. 489.

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TELFORD *v.* METROPOLITAN BOARD OF WORKS.

[1870 T. 86.]

Vendor and Purchaser—Metropolitan Commons Act, 1866 (29 & 30 *Vict. c.* 122)—*Metropolitan Board of Works—Inclosure Commissioners—Local Management Scheme—Powers of Board to sell or lease Part of a Metropolitan Common—Application to Parliament—Injunction.*

After the passing of the *Metropolitan Commons Act*, 1866, the Plaintiff, a part owner, and the other co-owners, of a manor, the waste of which became, under the above statute, a metropolitan common with the Board of Works as its local authority, sold and conveyed the manor (with the knowledge of the board), for a sum of £10,200, to two trustees, who afterwards sold and conveyed the same to the Board of Works. By the former conveyance, the Plaintiff (being the owner of house property near the common) stipulated that if, within five years from the date of the deed, the common should not be inclosed and dedicated to the public, having no part of it sold or let on building leases, he (the Plaintiff) should re-purchase his share of the manor on giving the same price for it as he was then receiving.

The Board of Works, with notice of this stipulation, memorialised the Inclosure Commissioners to prepare and certify a scheme of local management, and the Commissioners (on the suggestion of the board) published a scheme, whereby it was proposed to give the board power to sell or let on building leases a small outlying portion of the common, for the purpose of recouping to the board their expenses of and attending the inclosure.

Upon bill to restrain the board from promoting the scheme, or any scheme inconsistent with the stipulation:—

Held, that the Board of Works were bound by the stipulation in the conveyance by the Plaintiff:

Held, further, that the Plaintiff's right, under the stipulation, to sue in equity was not affected by the circumstance that the scheme, in order to become operative, must be submitted to Parliament; and injunction granted as prayed.

Motion for decree.

Prior to the passing of the *Metropolitan Commons Act*, 1866 (29 & 30 Vict. c. 122), the inhabitants of *Streatham*, *Surrey*, and the neighbourhood, being desirous of having the common of the manor of *Tooting Beck* dedicated to the use of the inhabitants of the metropolis permanently, had authorized two gentlemen, named *Beriah Drew* and *Philip William Flower*, as their agents to negotiate with the owners of the manor, and the latter had signified their willingness to part with the manor and the manorial rights for £10,000.

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On the 10th of August, 1866, the Act was passed; and under it *Tooting Common* became a metropolitan common, having for its local authority the Metropolitan Board of Works (1).

On the 2nd of November, 1866, the architect of the board, Mr. *George Vulliamy*, made a report on *Tooting Common* to the effect that he had surveyed the property, which consisted of 144 acres of common grazing land; that he had been informed it was proposed to convey the rights of the lords of the manor for £10,000; and he added, "The price is moderate, and the more so if it be certain that the board may devote the outlying portion at *Dragmire Lane* and adjoining *Black Hat Lane* to building purposes. . . . . I have estimated the value of the building land and the frontages in *Dragmire Lane*, and, presuming these are re-saleable, and can be dealt with by the board, a recoupment of £4000 to £5000 may be calculated for the same, including the expense of forming all necessary roads and drainage."

On the 30th of November, 1866, a memorial was presented to the Board of Works by Messrs. *Drew* and *Flower*, and a Mr. *William Carpmael* (since deceased, who was then a member of the board),

(1) The following provisions of the Act were referred to:—

By sect. 5 the authority of the Inclosure Commissioners to inclose a metropolitan common is put an end to.

Sect. 6 is as follows:—"A scheme for the establishment of local management, with a view to the expenditure of money on the drainage, levelling, and improvement of a metropolitan common, and to the making of by-laws and regulations for the prevention of nuisances and the preservation of order thereon, may be made under this Act, on a memorial in that behalf presented to the Commissioners by the lord of the manor, or by any commoners, or by the local authority. . . ."

On the presentation of such a memorial, the Commissioners may, after examination and inquiry, prepare a draft scheme; and, if they do so, are to print, publish, and circulate the same, and after receiving objections or suggestions, and, if they think fit, making inquiries by means of public sittings held by an assistant Commissioner, shall, if they think fit, finally settle and approve of the same. Such scheme shall (sect. 14) state the rights affected thereby, which rights shall (sect. 15) be compensated for; any dissatisfied person being enabled (sect. 16) to obtain a decision on the Commissioners' determination by an action in the manner provided by the *General Inclosure Act* (8 & 9 Vict. c. 118, s. 56). Every scheme, when approved by the Commissioners, is to be certified by them.

Sect. 22 provides as follows:—"A scheme certified by the Commissioners shall not of itself have any operation; but the same shall have full operation when and as confirmed by Act of Parliament, with such modifications, if any, as to Parliament seem fit."

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all of *Streatham*, shewing what had taken place with regard to the common, and that the memorialists had, "upon their own responsibility, agreed to purchase" the manorial rights for £10,000; and that at a public meeting it had been resolved that application should be made to the board to purchase the manorial rights in order that the common might be kept as a public open space for ever; and praying the board, under the powers vested in them by the *Commons Act*, 1866, and other Acts, "to take such action and proceedings as will insure that the said common shall be secured and dedicated to the public, and maintained at the cost of the ratepayers of the metropolis as an open space for the recreation of the inhabitants of the metropolis for ever."

This memorial was referred to a committee which, on the 3rd of April, 1868, recommended as follows: "That the board do forthwith, under the powers vested in them by the *Metropolis Management Acts* and under the *Metropolitan Commons Act*, 1866, acquire the interests of the lords of the manor, or of their representatives, in the common of *Tooting Beck*, with a view to a scheme being prepared and sanctioned under the last-mentioned Act, for the advantage of the metropolis, and that a contract be prepared for the payment of the sum of £10,200 and interest and expenses on a proper title being shewn and arrangements being duly completed."

The report having been read and received, a resolution was passed in the terms of the recommendation; and it was resolved that it be referred back to the committee to carry out the necessary arrangements.

By an agreement dated the 10th of July, 1868, and made between *Robert Hudson*, owner in fee simple of an undivided moiety of the manor, of the first part; *Henry Willis*, trustee for sale of the other moiety, of the second part; the several persons therein mentioned, including *Charles Telford* the younger, being the persons entitled to the proceeds of the sale of such moiety, of the third part; and the above-named *B. Drew* and *P. W. Flower*, of the fourth part; after reciting, amongst other things, that *Charles Telford* was largely interested in lands adjoining the common or waste lands belonging to the manor, and it was considered by him that it would be greatly to his interest that such common or waste lands should not be built upon, and that upon that ground he had

been induced to enter into that agreement, they, the said *R. Hudson* and *H. Willis*, with the consent of the parties thereto of the third part, thereby agreed to sell, and the said *B. Drew* and *P. W. Flower* agreed to purchase, at the price of £10,200, the manor of *Tooting Beck*, with its appurtenances. The agreement contained the following stipulations:—

"9. In the event of the commons or waste lands belonging to the said manor not being given or dedicated to the public as a park or recreation ground, under the provisions of an Act of Parliament entitled the *Metropolitan Commons Act*, 1866, or any other Act of Parliament, and in such way that no part thereof be at any time, without the consent in writing of the said *Charles Telford*" (and three others of the eight co-owners), "their respective executors, administrators, and assigns, sold or let on building or any other lease for the purpose of defraying the expenses of making or maintaining the said park, or for any other purpose whatsoever, and so that no house or any other building be erected on such commons or waste lands, except such lodges or other buildings as may be necessary for the maintenance or management of the said park or recreation ground, within a period of five years from the date of the conveyance to the purchasers; then, at the expiration of such period of five years, the said *Charles Telford* shall purchase, and the present purchasers shall convey to him, one undivided twenty-fourth part or share of the hereditaments and premises hereby contracted to be sold at, or for the price or sum of, £425, being an amount equal to that which he, the said *Charles Telford*, will receive under this contract of the said sum of £10,200." (Then followed similar provisions with regard to the three other co-owners).

"10. The contract for purchase by the said several parties mentioned in the 9th article shall not interfere with the power of the parties hereto of the fourth part, or the survivor of them, or his heirs or assigns, as lords or lord of the said manor, to memorialise the Inclosure Commissioners for *England* and *Wales* and the Metropolitan Board of Works, or the local board, as the case may require, to cause or authorize the said commons to be inclosed under the provisions of the *Metropolitan Commons Act*, 1866, provided that the scheme be not inconsistent with this agreement, and to act in all respects as lords or lord of the said manor in

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relation to such inclosure; and all parties hereto shall, if and so far as may be necessary, concur in the memorial and consequential proceedings under the Act.

"11. If at any time within the said period of five years the dedication in manner aforesaid of the said commons or waste lands to the public shall be found to be, in the opinion of the purchasers, or the survivor of them, impracticable, then the purchasers or the survivor of them, or their or his heirs or assigns, shall be at liberty to give the respective vendors aforesaid, or the heirs, executors, or administrators of such of them as shall be then dead, notice in writing that the appropriation and dedication of the said commons and waste lands in manner aforesaid to the public has been found to be impracticable; and immediately upon the giving of such notice, the provision in the 9th article shall come into operation and take effect as if the said period of five years had then expired, and the commons and waste lands had not been dedicated to the public in manner aforesaid."

By a deed of conveyance dated the 17th of December, 1868, the manor was, for the considerations therein mentioned, granted to and to the use of the said *B. Drew* and *P. W. Flower*, their heirs and assigns, as tenants in common, in equal shares. The deed was executed by *Hudson* and *Willis*, but *Charles Telford* and the other co-owners declined to execute it, on the ground that the recitals were inaccurate or imperfect, and the provisions not in accordance with the agreement of the 10th of July, 1868.

At about the same time a draft memorial by the board to the Inclosure Commissioners was being prepared in anticipation of the contract which was afterwards completed between Messrs. *Drew* and *Flower* and the Board of Works; and after such memorial had been settled, Mr. *Smith*, the solicitor to the board, received from Mr. *Alfred Carpmael*, one of the firm of Messrs. *Drew* and *Flower's* solicitors, the following letter:—

"There is a small piece of the waste of this manor, which has been separated from the rest of the common by the *West London and Crystal Palace Railway*, which we think might well be sold, and which, if sold, would, we think, recoup the board nearly, if not quite, all the costs which they will incur with reference to this common. It will be found on investigation that the piece of land

in question is comparatively valueless for public purposes; but we have reason to believe that Mr. *Telford*, an adjoining owner, would give a large price for this piece if it could be sold to him as freehold. This, it seems to us, could be done, if it were made part of the scheme by which the rest of the common will be dedicated to the public, that this portion should be severed and sold. If this were done, it would, in fact, give Mr. *Telford* a Parliamentary title. The piece in question is coloured blue in the accompanying plan. . . . Will you consider the question whether it is desirable that this piece of land should be sold, and, if sold, what price would be fair for Mr. *Telford* to pay? If any conclusion can be come to on these points, we believe Mr. *Telford* would be willing to enter into a conditional contract at once."

On the 8th of February a meeting of the board was held, at which the draft contract and draft memorial were submitted. A report from the solicitor was also read, in which, after setting out the above letter from Mr. *Carpmael* to him, the writer proceeded to say:—

"The proposed sale is, of course, a matter for the consideration of the board, independent of the contract with Messrs. *Drew* and *Flower*. There seems to be no objection to the board, as a matter of law, entering into a contract with Mr. *Telford* conditionally on their own contract not being determined, and upon the board being enabled by the scheme to give effect to it; and if the board think it well to sell, they will, no doubt, be advised as to the value. With regard to the scheme, it will be observed that no allusion at all is made to the board building, or selling land for building, on any part of the land to be acquired. There is considerable difficulty in introducing any such matter into the scheme, although Mr. *Vulliamy*, in his report of the 2nd of November, 1866, alludes to a recoupment of from £4000 to £5000 from frontages in *Dragmire Lane*. Counsel thinks that any such plan of recoupment is attended with difficulty and danger, and possibly scarcely authorized by the Act; and that possibly the only way of dealing with the property in that way, if the board should really desire so to appropriate it, would be by legislation in after years. The committee will be pleased to consider if they will approve the contract in the form annexed, and submit it to the board for

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confirmation, and consider what directions they may desire to give as to any sale to Mr. *Telford*, or what directions the committee may desire to give generally in the matter."

At the same meeting the two drafts were submitted, and at another board meeting, on the 12th of February, they were approved and adopted. Neither draft contained any reference to the piece of land marked blue.

By an agreement dated the 31st of May, 1869, indorsed on the conveyance of the 17th of December, 1868, and made between *R. Hudson*, of the first part, *H. Willis*, of the second part, *Charles Telford* and the other co-owners, of the third part, and *B. Drew* and *P. W. Flower*, of the fourth part, after reciting the refusal of the parties of the third part to execute the therein within written indenture, on the grounds above mentioned, it was agreed, "anything in the said deed of conveyance of the 17th of December, 1868, notwithstanding," in the terms (repeating them) of the clauses of the agreement of the 10th of July, 1868, set out above.

By another agreement, dated the 25th of June, 1869, and made between *B. Drew* and *P. W. Flower*, of the one part, and the Board of Works, of the other part, after reciting the agreement of the 10th of July, 1868, and that the same was entered into by *Drew* and *Flower* "with the knowledge and approval of" the board, "to the intent that the commons or waste lands belonging to the said manor might be dedicated to the public as a park or recreation ground, and that *Drew* and *Flower* had accepted the title and paid the purchase-money with interest up to the 17th of December, 1868; and that the manor had been conveyed to them by a deed of the 17th of December, 1868, "subject to stipulations "authorized by the said articles of agreement, as modified or explained in a deed of the 31st of May, 1869, indorsed on the conveyance;" and that the board intended to take proceedings under the *Commons Act* in reference to the commons or waste lands; it was witnessed that *B. Drew* and *P. W. Flower* agreed to transfer their purchase and all their interest in the said manor, commons, and waste lands to the Board of Works, and the board agreed to "accept the transfer thereof upon the terms mentioned in the same agreement, and all the terms of the agreement should be considered as embodied, *mutatis mutandis*, in the agreement" now in

statement, "the said *Beriah Drew* and *Philip William Flower* assuming the place of the vendors, and the said Board of Works assuming the place of the purchasers," in the recited agreement. It was also provided that the board were to purchase at the price of £10,200, and all interest already paid and payable, and to pay the costs of *Drew* and *Flower* incurred, or to be incurred, in relation to the agreement and contract. *Drew* and *Flower* were, if required by the board, to concur in the memorial.

On the 31st of July the board presented an altered form of memorial to the Inclosure Commissioners. It recited that the board had entered into a contract with the purchasers of the manor, the effect of such contract substantially being to take the place of such purchasers under the first contract. It further stated: "There is a small piece of the common separated from the remainder thereof by the *West London and Crystal Palace Railway*, which might be advantageously sold or let by the board, provided certain rights of pre-emption, in case of the common not being wholly devoted to public purposes, should not be an obstacle to their so doing, and it may be desirable to deal with this in any scheme under the said Act."

The memorial then prayed that a draft scheme might be prepared and settled (following the provisions of the statute).

On the 17th of August, 1869, the Inclosure Commissioners wrote to the board to say they had considered the memorial, and would feel obliged by the board forwarding them a draft scheme for their consideration.

Accordingly, on the 15th of December, 1869, a draft scheme, prepared by the board, was forwarded to the Commissioners.

In May, 1870, the Inclosure Commissioners issued and published a printed draft scheme, purporting to be pursuant to the *Commons Act*. It recited the stipulations indorsed on the deed of the 17th of December, 1868, and that the piece of common coloured blue, being of small extent, and being separated from the other and larger portion of the commons or waste by the railway, "its dedication to the public would be of slight advantage, and being property which could be sold or let to advantage, it would be more desirable if the same were sold or let, with a view to the proceeds arising therefrom being applied in manner hereinafter mentioned;

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and it is, under the circumstances aforesaid, desirable that such powers to sell or let such small piece of common should be conferred on" the Board of Works as thereinafter appeared.

The scheme then proposed (clause 9) that, "notwithstanding the stipulations and rights of pre-emption subject to which the said manor and premises were so conveyed to" *Drew* and *Flower* as aforesaid, it should be lawful for the board "to purchase and acquire such rights of pre-emption, first making compensation for the same," such compensation, in case of difference, to be ascertained in manner mentioned in the 13th section of the *Commons Act*, 1866.

Also (clause 10) that the board might "sell and dispose of" the land coloured blue, "or may let the same, or any part or parts thereof, either upon building or other leases, and afterwards sell and dispose of the land or lands so let, subject to the lease or leases thereof, and all moneys arising from the sale, letting, or other disposition of the" land coloured blue "shall be paid to the board," and, so far as unapplied towards payment of any purchase and other expenses of the board, be carried to the Consolidated Loans Fund, and be applied as provided in the 27th section of the *Metropolitan Board of Works* (*Loans*) *Act*, 1869.

Thereupon, on the 24th of June, 1870, the bill was filed by *Charles Telford* against the Board of Works, *Drew*, and *Flower*, stating the above-mentioned deeds and draft scheme; alleging that the draft scheme was, so far as regarded clauses 1, 9, and 10, an adoption of a memorial presented by the Defendants the board in contravention of the provisions set out above, and that it was issued with the privity and at the request of the Defendants, and at their cost and expense, but without the Plaintiff's knowledge; and that any scheme in conformity with such draft would entirely defeat and render nugatory the above provisions; and praying that the Defendants might be restrained from "promoting or supporting" the scheme of which the draft was thereinbefore set forth, or any other scheme purporting to be under the provisions of the *Commons Act*, 1866, "whereby a part only and not the whole of *Tooting Beck Common* aforesaid, or other the commons or wastes of the said manor, shall be dedicated to the public as a park or recreation ground," or whereby any part of the same should be

sold or leased without the Plaintiff's consent, or which should be inconsistent with the provisions contained in the agreements aforesaid, and from doing any act whereby the Plaintiff's right of purchase under the said agreements might be defeated or prejudiced.

The Board of Works, by their answer, filed on the 6th of August, 1870, submitted as a matter of law, whether or not their memorial was presented by them in contravention of the provisions of the agreements of the 10th of July, 1868, and the 31st of May, 1869; and submitted that if it was, they, in exercise of their public duties, under the circumstances, were justified in presenting, and were in fact bound to present, such memorial.

They said that the draft scheme in its present form had been issued by the Commissioners after mature deliberation, and with full knowledge of the circumstances, including the two agreements; that during the preparation of the draft scheme the Plaintiff frequently intimated to Defendants' solicitor his desire that the land in question should be sold, and not dedicated to the public; that the first intimation Defendants received of any objection on the part of the Plaintiff to the arrangement proposed by the draft scheme was the service of the bill; that the Plaintiff, as they believed, had been all along aware that it was in contemplation to obtain from Parliament power to sell the land coloured blue, and that the necessary proceedings were being taken; and that he himself had offered to purchase the land.

They also said that the further prosecution of the matter in point of law rested with the Inclosure Commissioners, and submitted that any such injunction as prayed by the bill would or might, under the circumstances, be entirely nugatory with reference to the provisions of the *Metropolitan Commons Act*, 1866. They admitted that, having regard to the great benefit to be derived by the public from the draft scheme, they, in exercise of their public duties, and upon grounds of public policy, intended, unless restrained, to promote and support the draft scheme.

They said that any objection to the draft scheme on the part of the Plaintiff, even if allowed, would probably be attended with loss and trouble to him, but only such as were consequential on the passing of the *Commons Act*.

They claimed the benefit of objections, whether founded on the

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want of privity between themselves and the Plaintiff, or on the want of parties, as if they had demurred; and submitted that the Plaintiff, by reason of his laches, delay, acquiescence, and other conduct, was disentitled to relief.

Messrs. *Drew* and *Flower* answered on the 10th of November, 1870.

On the 25th of February, 1871, the bill was amended, setting forth the memorial of July, 1869, of which the Plaintiff had first become acquainted since the filing of the bill; and alleged that it was presented with the knowledge and approbation of the Defendants *Drew* and *Flower;* and prayed as before.

The Plaintiff, in his evidence, contradicted the statements in the answer as to the intimation by him of his desire that the land should be sold, and as to his knowledge of the intention to apply to Parliament for power to sell it; and upon these points there was a conflict of evidence.

It appeared that a negotiation of some kind for the purchase of the land by the Plaintiff took place between his solicitor (as the Plaintiff said without due authority) and the other solicitors; and a letter written by the Plaintiff's solicitor to the solicitor of the board, dated the 16th of November, 1869, was put in evidence, in which the writer said: "There is an inconsiderable portion of the common, to the north of the railway, which my client would like to acquire, and he will buy it if he can; but without releasing Messrs. *Drew* and *Flower*, or their assignee, from any obligation they may be under in respect of the common." This negotiation ultimately failed.

In consequence of the institution of this suit, the Inclosure Commissioners (who were not made parties) had refused to proceed with the consideration of the scheme.

Mr. *Kay*, Q.C., and Mr. *T. Stevens*, for the Plaintiff:—

The main question of law is whether the local authority, in this instance the Board of Works, can be restrained from going to Parliament, under the *Metropolitan Commons Act*, 1866, by reason of their having entered into a contract with the Plaintiff. The Board of Works, it is true, call this a right of pre-emption, for which, they say, the Plaintiff may get compensation. But it is more than a right of pre-emption; it is an absolute contract.

The true meaning of the negotiation, which the Defendants say was an offer to purchase, was this: The Plaintiff's solicitor pointed out to the Defendants' solicitors that the Plaintiff and the other co-owners of the moiety had the power to release the board, and he said to them, "If you will convey to the Plaintiff, he will release you." But, instead of accepting this proposal, they fence with the Plaintiff; they don't send the scheme; but they try, behind his back, to get power to sell or lease this land.

The answer to the argument that they have a right to go to Parliament, is, that they must not violate their own contract. We do not seek to disturb their right to go to Parliament; all we say is, that they can only go in a way which will be consistent with their agreement.

By sect. 14 of the *Commons Act* the scheme is to state the rights of the various parties affected, and when the Plaintiff's rights come to be stated, they are found to be a contract that such a scheme shall not be presented; so that the whole argument is a *reductio ad absurdum*.

Another answer is that the Plaintiff may take the expensive course of going in before the Commissioners; but he prefers the tribunal of the Court of Chancery.

The motive of the board throughout is manifest, having been first suggested to them by Mr. *Vulliamy's* report in 1866. They wanted to make money, and for that purpose to acquire this land. But the Board of Works have not obtained from Parliament any powers of acquiring money by trafficking in land or any other description of property, even in relief of rates; and the *Commons Act*, 1866, does not even empower them to hold land. It only gives them powers of management over land.

The excuse of the board is, that the selling or leasing of this plot of land will be for the benefit of the public. It is difficult to see how the withdrawal of any portion of the common from public use can be of advantage to the public. It is suggested that the rates will be relieved; but the ratepayers are only a portion of the public, and the statute does not contemplate that ratepayers are to be relieved at the expense of individuals to whom the board is under obligations by way of contract.

No doubt the 16th section of the *Commons Act*, 1866, preserves

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to the person aggrieved by the decision of the Commissioners the right of action by way of appeal provided by the 56th section of the *General Inclosure Act* (8 & 9 Vict. c. 118). But the old Inclosure Acts did not oust the jurisdiction of this Court: *Speer* v. *Crawter* (1); *Frewin* v. *Lewis* (2); and if the Court will restrain Inclosure Commissioners, *à fortiori* will it restrain a public body like this board, who are attempting to set the Commissioners in motion.

It is suggested that this application will have the effect of restraining the privileges of Parliament; but this is not so; the privilege of Parliament is untouched. All that the bill seeks is to restrain the Board of Works from violating a contract.

Acquiescence, to be of any avail, must be acquiescence amounting to a positive agreement to abandon a right. No such acquiescence has been shewn here.

Mr. *Eddis*, Q.C., and Mr. *Charles Hall*, for the Defendants the Board of Works:—

Our answer is in the nature of a demurrer to the bill. It will be observed that no injunction has been moved for.

This is an attempt to induce the Court of Chancery to interfere with a public body carrying on their public duties for public purposes. The Act which gives the board these powers gives also to aggrieved persons the fullest opportunity of being heard before the Commissioners, and of appealing from their decision.

Moreover, this is an attempt to stop an application to Parliament.

An injunction would be wholly nugatory; because, under the *Commons Act*, the matter has passed out of the hands of the local authority, and is now before the Commissioners.

As to the jurisdiction: No doubt the Court will prevent a man, who has contracted, for valuable consideration, not to use a personal right, from exercising that right; but it will not restrain an application to Parliament on public grounds. No man can contract himself out of a right to apply to Parliament on public grounds. In *Heathcote* v. *North Staffordshire Railway Company* (3), Lord *Cottenham* dissolved injunctions which had been

(1) 17 Ves. 216. (2) 4 My. & Cr. 249. (3) 2 Mac. & G. 100, 110.

granted by Vice-Chancellor *Shadwell*. He said: "The ordinary province of Parliament . . . is to abrogate existing rights and to create new rights." . . . "Parliament has the same power of destroying, altering, or affecting such pre-existing rights, providing, as it always does, or intends to do, compensation. . . . This Court has not the right to interfere by injunction to deprive the subject of the right of applying to Parliament for a special law to supersede the rules of property by which he finds himself bound, whether arising from contracts or otherwise." In *Attorney-General* v. *Manchester and Leeds Railway Company* (1), Lord *Cottenham* would not interfere, although he found that the company were endeavouring to obtain Parliamentary authority to prevent the Court from carrying into effect an undertaking which they themselves had given. In *Lancaster and Carlisle Railway Company* v. *North Western Railway Company* (2), the Lord Chancellor (then Vice-Chancellor *Wood*) reviewed the cases. The result was held to be, that applications to Parliament on public grounds cannot, in any case, be restrained by injunction.

Additional authorities are *Steele* v. *North Metropolitan Railway Company* (3); *In re London, Chatham, and Dover Arrangement Act, Ex parte Hartridge* (4).

The evidence shews that the Plaintiff all along knew of the intention to inclose the common. Then he came and wanted to buy the land, shewing that he understood the prior agreement to be at an end.

It is not contended that such a stipulation as this would not run with the land; but the circumstances shew that it was intended to be personal only between the Plaintiff and Messrs. *Drew* and *Flower*. Could the Court have restrained any private purchaser from *Drew* and *Flower* from building on the common? But here, under the Act, the board has a right of acquiring this land. Will the Court, under these circumstances, issue an injunction?

Supposing the Commissioners have no power to inclose, why should the board be restrained? Is it the practice of the Court to restrain a person from applying to some one else who has no authority to act?

(1) 1 Railw. Cas. 436.
(2) 2 K. & J. 293, 304.
(3) Law Rep. 2 Ch. 237.
(4) Ibid. 5 Ch. 671.

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The *Metropolitan Commons Act*, 1866, is one of a class of statutes which has been rather common of late. Parliament has committed to certain persons the power of initiating proceedings, reserving to itself the final step. Such an Act was the *Tramways Act*, 1870 (33 & 34 Vict. c. 78). What is now being done, therefore, is merely a step towards setting Parliament in motion. Any person claiming any rights may (sect. 11) object; and such rights must (sect. 14) be stated, and (sect. 15) be compensated for. Sections 6 and 31 shew that the acquisition of land by the local authority is contemplated. They have the power of dealing with the common in every possible way.

The evidence shews the true construction of the agreement to be that this was a right of pre-emption in the Plaintiff. That is a right which is necessarily confined to him personally; and it does not affect the Board of Works as assigns of the manor.

The Plaintiff himself, being one of the lords of the manor, has himself authorized the presentation of the memorial, and hence has deprived himself from the right of opposing.

The board is a public body acting on behalf of the public, and the Court will not interfere, even if the circumstances were such as to warrant interference in the case of a private person.

If the injury complained of is a thing which can only be accomplished by the confirmation by Parliament of a scheme, then the board is not the body (if any there be) which is to be restrained. The matter is out of their hands, and is vested in the Commissioners.

The Plaintiff complains of the expense which would attend any application to the Commissioners. That is an inevitable result of the passing of the statute; the question is, how are the public to be compensated for the delay in dedicating this common to their use?

Mr. *W. Morris*, and Mr. *Casson*, for the Defendants Messrs. *Drew* and *Flower*.

SIR JAMES BACON, V.C., after observing that he had no reason to doubt that the Board of Works had acted as they thought right in the discharge of a public duty, and that he desired to say nothing

which could throw the least imputation upon them for anything that they had done; also that the Plaintiff, as it seemed to him, had acted very properly for the protection of his legal rights, continued:—

The case is one which, in its nature and elements, is of the simplest possible kind. One of several persons, proprietors of *Tooting Common*, being also an owner of land which has been laid out for building purposes, and who, therefore, is naturally interested in the condition in which *Tooting Common* shall be kept, and the other owners, enter into a contract with two gentlemen, who seem to have acted from public motives, for the sale to them of *Tooting Common*, in order that it may be (for that is the ultimate object) devoted to the recreation and enjoyment of the public. That being the plain object of the Plaintiff and of all the other landowners (the Plaintiff having in view his own interests also as an owner of land laid out for building purposes), they enter into the agreement which is stated in the bill. The agreement is as plain as it need be; perhaps it might have been expressed with greater distinctness, but it is sufficiently plain. The object of it is to provide, after regulating the terms of the purchase, that, if by any accident the objects which the vendors have in view could not be accomplished, namely, dedication to the public, and not omitting (as I cannot omit) circumstances which appeared of special interest to the Plaintiff, Mr. *Telford*—if those objects cannot be accomplished, then the right to have back again that which they agree shall be sold shall be reserved to the vendors without reference to the particular nature of the property. That is a stipulation which a vendor might properly make in almost any instance of this kind. Upon these terms Mr. *Drew* and Mr. *Flower* make this purchase. After having made the purchase (perhaps something may have taken place before, although it is not pointed out), they communicate to the Metropolitan Board of Works, which is the local authority appointed by the Act of Parliament, that they have done so; and in a memorial, which is in evidence, they state their motives for making the purchase, and the object which would be accomplished by its being completed, and suggest to the Metropolitan Board of Works that, in the discharge of their public duty, they cannot do better than take the

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bargain off their hands. The Metropolitan Board of Works take that view of the subject themselves; and then we find an instrument set out in the pleadings, which is as distinct as anything can be, namely, a contract between the Metropolitan Board of Works and Mr. *Drew* and Mr. *Flower*, made with reference to the original agreement. In express and explicit terms the Metropolitan Board of Works contract that, if they become the purchasers (for in certain events they may not), they will take the property in the same manner and with the same rights, and no other, and subject to the same obligations, as Mr. *Drew* and Mr. *Flower* would have been under if they had continued the owners.

Upon the construction of the document, and upon the plain intent and meaning of the parties, there can be no doubt that the transaction was a reasonable and proper one—quite proper on the part of the owners of the land, having regard to their interest—and quite proper on the part of the Metropolitan Board of Works, having regard to the discharge of their public duties.

If Mr. *Flower* and Mr. *Drew* had remained the sole owners of this property, could it be argued for a moment that they could have shuffled off this obligation which they had taken upon themselves? Of course no such contention can be raised. Can it be said, since the Metropolitan Board of Works were content to contract, and have contracted, to be in the very shoes of Mr. *Drew* and Mr. *Flower*, that they can relieve themselves from the obligation which they have contracted? I cannot see any reason in law, certainly there cannot be any in morals or in justice, why they should be heard to say so, or why they should say so.

Part of the argument for the defence, not of necessity, but by way of hypothesis only, was founded on the assumption that the Metropolitan Board of Works was accused of having done something reprehensible. It is right for me to say that I protect myself against being supposed to say anything with respect to the Metropolitan Board of Works which could impute any such blame to them. But I take it that, unless there is some privilege beyond the law, or some rule with which I am unacquainted, which shall be applied in favour of the Metropolitan Board of Works, there can be no ground upon which they can be heard to say that they are entitled to do

anything, or to attempt to do anything, which is in contravention of this very plain agreement. The proceedings which took place afterwards are all quite inconsistent with it.

The first draft of the intended memorial to the Inclosure Commissioners did not propose to interfere with the rights of the vendors. By the time the second draft of the memorial came to be prepared, another view had occurred to the Metropolitan Board of Works. I cannot shut my eyes to the fact, though it has not been much dwelt upon, that Mr. *Vulliamy*, in his report, suggested to the board that that part of the land which is coloured blue, and which is the subject of this suit, might be profitably employed by them for the purpose of building, which would have been wholly subversive of the intention of the parties who entered into the agreement, and plainly detrimental to the interests of the public. That notion having been suggested, the board, in their amended form of memorial addressed to the Inclosure Commissioners, do (if I do not misunderstand the effect of the documents) suggest that they may make useful employment of some part of the land which is not wanted for public purposes, and that they have in view that the proceeds of it may be applied in diminution of the purchase-money, or in payment of costs and expenses.

It appears that, upon the presentation of the memorial, the Commissioners, whose duty it is, under the Act of Parliament, to prepare a draft scheme, requested the board to prepare a scheme for them. It is in consequence of that request that the Board of Works took upon themselves, not unwillingly I daresay, to prepare that draft scheme which was afterwards submitted to the Commissioners, and in which that stipulation to which the Plaintiff objects was introduced.

To say that the Commissioners have suggested this would be to do violence to the very plain facts of the case. For saying that, in framing the memorial, there is any pretence of right on the part of the Metropolitan Board of Works, in the discharge of their public duties, to acquire this land and to get rid of the obligation, there is no foundation whatever. The Metropolitan Board of Works have only a plain duty to perform; the Act of Parliament points it out distinctly, and as distinctly points out the duty of the Commissioners.

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What the Metropolitan Board of Works want, in plain English, is to make money by this transaction. They do not conceal it. If they had attempted (and they have not attempted) to do so, it would have been in vain, because it is plain upon the face of the transaction. They say they are acting in pursuance of the *Metropolitan Commons Act*, 1866. Now, see what the nature of the Act of 1866 is. It first of all takes away the power which the Inclosure Commissioners had to inclose commons. There is to be no inclosure of metropolitan commons; but instead of that, in order to maintain the useful objects which the Legislature had in view, the Commissioners are authorized to make schemes for the management of commons. The 1st section having taken away the power to which I have referred, the 6th section, which seems to me to be most important, is this:—[His Honour read the section.] That is the only power which I can find. The memorial which has been presented by the Board of Works to the Commissioners in this instance does not follow that provision of the Act of Parliament. It is not that they desire the approbation of the Commissioners either for the local management or the expenditure of money in draining, levelling, and improving the common, all of which are perfectly within their powers; but what they ask is this: They say, "We have entered into an agreement to buy as if we were individuals (not in the exercise of our powers as the Metropolitan Board of Works), for a sum of money, this common. We desire your assistance under this Act of Parliament for draining, levelling, managing, preparing by-laws, and so on; and besides that, we beg to communicate to you that, although the Act of Parliament gives you no power to deal with this subject at all, yet, if by twisting words which are hereafter to be referred to, you can put us in the way to make some money by this transaction, we desire to have the authority, protection, and guarantee of your power, in order to enable us to do that thing. We did enter into a bargain; we are tired of it; we think we can make money by breaking it, and we ask you to help us to do so." That is the plain English of the transaction.

The Act of Parliament is invoked. The Act of Parliament provides, with perfect reason and propriety, the means by which a scheme for local management is to be established. The Com-

missioners ought to have prepared the scheme themselves. It is of no great importance that they did not, but they trusted the Metropolitan Board of Works to make the scheme. For two months after that they were to receive objections in writing; but no question arises about the time, because the objections were sent in in sufficient time. They are to consider any suggestion or objection that may be made. "Every scheme" (sect. 14) "shall state what rights (if any) claimed by any person or class of persons are affected by the scheme, and in what manner and to what extent they are affected thereby, and whether or not the scheme has been in relation thereto consented to by that person or class of persons or any of them." This is a scheme for the establishment of local management, and the expenditure of money in draining and levelling and making by-laws for the preservation of roads, and so on. No other scheme is contemplated by this Act of Parliament. The 15th section provides that "no estate, interest, or right of a profitable or beneficial nature in, over, or affecting a common, shall, except with the consent of the person entitled thereto, be taken away or injuriously affected by any scheme, without compensation being made or provided for the same, and such compensation shall, in case of difference, be ascertained and provided," and so on. Then by the 16th section, "If any person claiming any estate," and so on, "is dissatisfied with" the determination of the Commissioners, he may bring an action under the old Act of Parliament.

I was at a loss, during the argument, to find for myself any reason why the Metropolitan Board of Works could, with any reason, ask the Commissioners (under the pretence that there was some interest, profitable or beneficial, the extinction of which was necessary to making the scheme) that by the only scheme which the Act of Parliament authorizes to be made any contract should be abrogated, or the persons who have entered into such contract be absolved from the performance of it. In my opinion there is nothing in the Act which at all justifies any such view of the case.

It has been said, somewhat faintly, that it would be desirable to sell this piece of land coloured blue, because it is the haunt of gipsies, and may become a source of nuisance. The only observation I have to make upon that is, that there is nothing to that

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effect in the answer. The only mention of it is in the conversation which is said to have taken place between Mr. *Jackson*, a witness for the Defendants, and Mr. *Stevens*, who is the clerk or solicitor of the Plaintiffs. Upon the subject of that conversation the contradictions are as direct and positive as well can be; and I am unable to say, and I do not attempt to say, to which of these parties, in this matter of recollection or matter of conversation, I ought to give credence. I am unable to rely upon the statement on either side, and I leave it entirely out of my consideration at present. But in any event, the statement does not interfere with the scheme of the Commissioners. The Commissioners, by the scheme, have the power of making the by-laws and other regulations which are necessary to prevent the common becoming a nuisance. So that if the statement be in evidence, I do not attach any importance to it; and if it is, as I consider it to be, wholly out of the case, I need not further allude to the subject.

The main stress of the argument which Mr. *Eddis* has urged so ably and so fully is, that no such relief as the Plaintiff asks in this case can be given to him, because it would, in fact, be restraining an application to Parliament by a public body in the discharge of a public duty, and in which public interests are concerned. I thought that the law on this subject was at least as well settled as any other law of this Court. You cannot restrain a man from going to Parliament on public grounds; you cannot usurp that authority which rests only with the Legislature; you can shut no man's mouth; but if he is going on in violation of a plain contract, which is personal to himself, with which the public interests have nothing whatever to do, you cannot, under the pretence that he is going to Parliament, refuse the relief which, if there were no question about Parliament, this Court would be bound to give. That I take to be this case. I am not sure that there ever will be any application to Parliament; I am quite sure that there is no application to Parliament now in sight; because the Commissioners, although they have been induced, to a certain extent, to adopt the draft scheme which has been sent to them, have done so only for the purpose of inviting objections which may be made to it. In most express terms, by their draft scheme, they invite objections to be made to it; they take upon themselves no responsibility; they

have not exceeded their authority, or confirmed, in the slightest degree, any scheme which is laid before them. On the contrary, on the face of their scheme (which is not their affair, but the affair of the Defendants, the Metropolitan Board of Works), they state broadly the grounds upon which anybody who reads the paper may see that objections may be taken. They furnish information, and then ask if anybody has any objection to make. That is all that has passed. That is the state of things so far as the Inclosure Commissioners are concerned, and I do not find any fault with them. They have performed a sort of ministerial office in the manner which might be expected from them. They seem, moreover, if I may take the liberty of saying so (and I make the remark because they are absent persons), to have properly exercised their discretion in the matter. They have not decided in favour of either the one party or the other, but have left the whole matter entirely open.

I cannot consider that this case is within the scope of the authorities which have been referred to; all of which decisions, be it observed, were pronounced by the Court with evident reluctance and dislike, only yielding to what is the law and authority of this Court, though their own sense of right ran directly opposite to it. I can find no certain necessity for going to Parliament. Nothing in the injunction which is here asked, either in terms or effect, seeks to control the power which the Metropolitan Board of Works, or anybody else in this country, has to go to Parliament for the purpose of obtaining an Act, if they can, to authorize them to do the thing which they wish. I am obliged, admitting the entire and full authority of all those cases, to disregard them as inapplicable to this case.

There is only one other topic which I need mention, and that is this: It is suggested that Mr. *Telford*, the Plaintiff, has been willing himself to become the purchaser of this land. I have read the correspondence and the statement of the case. What does it all amount to? Mr. *Telford* does not attempt to disavow his desire to become the owner of this piece of land coloured blue, but he has at the same time insisted, upon all occasions, upon his right to prevent the common being applied to any other purpose than that for which he agreed to sell it. He says, "I will sell you this

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right of pre-emption; if you like I will release you from it; and if we can come to terms, I am willing to enter into a bargain with you upon that subject." That, like all other bargains, is to be taken or to be left. The Metropolitan Board of Works are under no obligation to enter into any contract with him. They cannot, on the other hand, say, "Because you have agreed to certain terms, one of which was to preserve your right and interest in your building land" (I do not mean that any such words were used), "if you will come to terms with us, we will buy all your rights, including the right of pre-emption, and deal with you upon these terms." Why not? There was nothing to prevent them doing that; and nobody will find any fault with them for doing it. That is not the question in this case. The question is, whether they can, by a strong hand, by the construction which they put upon this Act of Parliament, which I think is a wrong construction, place this Plaintiff in this position, that he must go before the Commissioners, fight his battles with them as best he can, and then, in the event of a bill being carried into Parliament, present his petition against it there, and then encounter difficulties, trouble, and expense which no success would adequately compensate him for, and that for no reason but because the Metropolitan Board of Works have taken into their heads that they can make a profit out of this piece of land purchased, and make a profit in a manner different from that which was contemplated by them when they entered into the contract, and totally opposed to that power which the Act of Parliament enables them to derive from the purchase which they have made.

Mr. *Charles Hall* argued that it was in the power of the board, being the local authority, to present a memorial to the Commissioners whenever they thought fit. I cannot restrain any local powers which they may possess, but, in granting the injunction as I do, in the terms in which it is prayed by the bill, I simply preserve a plain, honest, distinct contract between a vendor and a purchaser, and refuse to permit the purchaser to take more under the contract than he fairly bargained for, or intended to pay for.

There will be an injunction in the terms of the prayer of the bill, the Plaintiffs to pay the costs of the Defendants *Drew* and *Flower*,

add them to their own, and recover the whole from the Board of Works.

Solicitor for the Plaintiff: Mr. *Charles Stevens.*
Solicitor for the Board of Works: Mr. *W. W. Smith.*
Solicitors for the other Defendants: Messrs. *Wilson, Bristows, & Carpmael.*

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[1871 C. 67.]

Registration of Bills of Sale Act (17 & 18 *Vict. c.* 36)—*Deposit of Minute of Lease of Lands and Pledge of Chattels in Scotland—English Liquidation—Bankruptcy Act,* 1869 (32 & 33 *Vict. c.* 71).

An English debtor handed to the Plaintiff, an English creditor, a "minute" of a lease of a house and land in *Scotland* of which he was lessee, and a memorandum whereby he agreed to pledge the lease and certain chattels in the house by way of security for the debt. The minute provided for payment to the lessee for permanent improvements on the determination of the lease. The lease was determined, and a sum became payable for improvements. The debtor afterwards presented a petition for liquidation under the *Bankruptcy Act,* 1869, and trustees were appointed. By the law of *Scotland* the memorandum created no security:—

Held, that the *Bills of Sale Act* did not apply to property in *Scotland,* and that the Plaintiff had, as against the debtor's trustees, a good charge on the chattels and the money receivable for improvements.

MOTION FOR DECREE.

On the 10th of December, 1866, the Defendant, *Charles Jecks,* mortgaged lands at *Thorpe,* in *Norfolk,* in fee to *James Muskett* and others, to secure repayment of £16,000 and interest.

On the 22nd of January, 1870, *Jecks* mortgaged the same lands in fee to the Plaintiff, *Thomas Coote,* to secure repayment of £10,000 and interest.

On the 21st of September, 1870, *Jecks* again mortgaged the same freeholds, and also certain leasehold and copyhold hereditaments in *Norfolk,* and a bond debt of £15,000, to *Elijah Crozier Bailey,* to secure repayment of £10,335 14*s.* 3*d.* and interest.

On the 18th of October, 1870, *Jecks* assigned the equity of

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redemption in the bond debt to *Coote*, by way of further security for the above sum of £10,000 and interest.

Jecks having paid no interest on the 6th of April, 1870, or on the 6th of October, 1870, *Coote*, shortly before the 7th of January, 1871, pressed him for payment; and, accordingly, *Jecks* handed to *Coote*, as security for the interest then and thereafter to become due, an instrument in the Scotch form, called "a minute of a lease" of *Glenmorven Cottage*, and the right of shooting and fishing over the estate of *Glenmorven*, in the parish of *Morven*, in the county of *Argyle*. *Jecks* also signed and delivered to *Coote* a memorandum as follows:—

"I agree this 7th day of January, 1871, to pledge all furniture and effects of every kind I have at *Glenmorven* in *Argyleshire*, also the lease and building on the same, in *Scotland*, to *Thomas Coote*, Esq., of *Bournemouth*, for all or any interest I may owe him up to July, 1871, and the said *Thomas Coote*, Esq., may then sell the whole, if interest is not then paid up.

"*Charles Jecks*,
"*Woodlands*,
"*Thorpe, Norfolk.*"

The minute was expressed to be between Miss *Beattie* of the one part, and *Charles Jecks* of the other part. Miss *Beattie* thereby agreed to let the said subject to *Jecks*, whom failing by death, or in case of his desiring to surrender the lease, then to *Joseph Haycock*, Esq.; the time of entry to be Whit-Sunday, 1868, the duration of the lease to be ten years, subject to provisoes, first for cesser in the event of Miss *Beattie's* death, and secondly as follows:—

"That it shall be competent to the said Miss *Mary Stewart Beattie*, at any time during the lease, to resume possession of the whole premises on giving the tenant six months' previous notice and repaying him a reasonable portion of the outlay for permanent improvements which he may have made on the premises, as the same shall be ascertained by two neutral men to be mutually chosen, or by an oversman to be named by them in case of their differing in opinion, subject to this limitation, that the proportion so to be repaid shall not exceed £200."

The minute was, and according to the Scotch practice was

therein stated to be, signed by *Charles Jecks* at *Norwich* on the 30th of December, 1869, and by Miss *Beattie* at *London* on the 21st of the same month and year.

On the 9th of March, 1871, this bill was filed by *Coote* against *Jecks*, the first mortgagees, and *Bailey* and other subsequent incumbrancers, praying for the ordinary decree for sale in a mortgagee's suit.

On the 20th of March, 1871, *John Withers Dowson* and *Samuel Culley* were appointed trustees of the estate of *Jecks* under the "liquidation by arrangement" clauses of the *Bankruptcy Act*, 1869.

The bill was amended by making *Dowson* and *Culley* Defendants, and as amended stated that *Jecks* had agreed to give up the lease of the *Glenmorven* shootings, and that *Haycock* had been accepted tenant in his place, and was ready to pay the sum of £200 as the amount which the tenant would be entitled to receive from the lessor, and was also ready to pay the value of the furniture and effects, which he had agreed to take. It further alleged that *Dowson* and *Culley* claimed the sum of £200, and the value of the furniture from *Haycock;* also that *Jecks* was not a trader, and that whatever might be the law of *Scotland* as to the effect of the agreement of the 7th of January, 1871, by the law of *England* the same conferred a valid interest, as against *Dowson* and *Culley*, in the £200 and the furniture moneys. It then alleged that *Dowson* and *Culley* threatened to take proceedings against *Haycock*, and prayed that they might be restrained from doing so, or from receiving or preventing the Plaintiff from receiving the £200 and furniture moneys.

The Defendants, *Dowson* and *Culley*, in answer to the amended bill, said they believed that the instrument and memorandum above mentioned, according to Scotch law, gave the Plaintiff no interest in the Scotch property; and on their behalf an affidavit was filed by Mr. *Robert Berry*, advocate, and professor of the law of *Scotland* in the *University of Glasgow*, who stated that by the law of *Scotland* Mr. *Jecks'* right and interest in the lease, including his prospective interest in any payments to be made by the lessor for outlay on permanent improvements, and for houses or buildings erected by the tenant, were of the nature of heritable or real property, and in the absence of any valid or operative assignment

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by the tenant would pass to the creditors of the tenant in the event of his becoming bankrupt, subject to any right of the lessor to object, where assignees were excluded by the terms of the lease. He further stated that by the law of *Scotland* no valid or operative assignment of the lease, or of Mr. *Jecks*' interest therein, could be made, nor could the same be assigned, mortgaged, transferred, charged, or pledged, nor could any security or lien be created over the same in favour of any creditor, mortgagee, or purchaser, by the mere delivery of the minute of lease, or by a mere deed or instrument in writing executed and delivered by *Jecks*. To any operative assignment of a security over the premises it was indispensable that possession should be delivered up to and taken by the person to whom the assignment was made or the security given (except in some cases which had no application to the present). The memorandum in question was not an assignment, pledge, mortgage, or security of or over a lease of heritable or real property, according to Scotch law. Furniture and household goods and effects, and moveable chattels were, according to the law of *Scotland*, moveable or personal property, and passed to the creditors of the owner in the event of his becoming bankrupt. For the purpose of creating a pledge, security, or charge over moveables, including furniture and household effects, the above memorandum was wholly inoperative of itself, and for such purpose it was indispensable that delivery of possession of the moveables should be given to the pledgee.

Mr. *Kay*, Q.C., and Mr. *Chisholm Batten*, for the Plaintiff:—

We claim to have the first charge on the chattels and lease in *Scotland*.

It may well be that by the law of *Scotland* no mortgage or charge of the lease was created by the instrument in question. But the contract was made in *England*, by a domiciled Englishman; and it is subject to the rules of English law. On this point *Ex parte Pollard* (1) is an express authority. Lord Chancellor *Cottenham*, overruling the decision of the Court of Review (2), says (3): "If, indeed, the law of the country where the land is

(1) Mont. & Ch. 239. (2) 3 Mont. & Ayr. 340.
(3) Mont. & Ch. 250.

situate should not permit or not enable the Defendant to do what the Court might otherwise think it right to decree, it would be useless and unjust to direct him to do the act; but, when there is no such impediment, the Courts of this country, in the exercise of their jurisdiction over contracts made here, or in administering equities between parties residing here, act upon their own rules, and are not influenced by any consideration of what the effect of such contracts might be in the country where the lands are situate, or of the manner in which the Courts of such countries might deal with such equities."

Then, with regard to the chattels, the order and disposition clause (sect. 15, sub-s. 5) of the *Bankruptcy Act*, 1869, is expressly confined to traders, and has no application here.

Nor does the *Registration of Bills of Sale Act* (17 & 18 Vict. c. 36) apply to chattels in *Scotland*. By sect. 7 it is provided that the Act shall not extend to *Scotland* or *Ireland*.

If authority be necessary, *Flory* v. *Denny* (1) shews that a mortgage of a chattel may, by English law, be without a deed and without delivery.

Mr. *Amphlett*, Q.C., and Mr. *Tyssen*, for the first mortgagees.

Mr. *Bagshawe*, for the trustees in liquidation:—

It is not denied that by the Scotch law this deed gave no security; hence, if the law of *Scotland* is to prevail, nothing passed to the Plaintiff.

If, on the other hand, the deed is to be construed according to English law, then the *Bills of Sale Act* must apply. By sect. 7 it is enacted that the expression "bill of sale" shall include "bills of sale of goods in foreign parts, or at sea."

Mr. *Kay*, in reply, on the question of the *Bills of Sale Act*:—

The statute applies only to *England*; that is to say, it applies only to chattels in the country where credit has been given on the faith of their possession.

The expression "foreign parts" does not include *Scotland*, *Ireland*, or any British colony; in either of which countries a secret

(1) 21 L. J. (Ex.) 223.

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mortgage would be, by regulations of the country, impossible. Registration here of a mortgage of goods in *Ireland*, or in *Canada*, would be practically useless.

SIR JAMES BACON, V.C.:—

I think it must be so.

My first impression, I confess, was that the *Bills of Sale Act* must apply to personal property, wherever situate, of the person making or giving the bill of sale.

But I think that the true construction of the sections of the Act, taken together, is, that a bill of sale by a man in this country to another man in this country of personal property situate in *Scotland*, is not within the purview of the statute; and that the Act has no application to the property in this case.

There will be a declaration that the Plaintiff has a first charge on the £200 payable to the lessee on his giving up the lease, and on the furniture moneys.

Solicitor for the Plaintiff: Mr. *J. M. Yetts.*
Solicitors for the Trustees: Messrs. *Slee & Co.*

V.-C. B. 1872 *March* 16.

VYSE *v.* FOSTER.

[1870 V. 28.]

Practice—Affidavit of Documents—Sufficiency.

Three executors, two of whom, together with other persons not parties to the suit, were members of a firm to which their testator had belonged, had for many years allowed part of the testator's estate to remain in the firm. On a bill against the executors for administration and to make the Defendants account for profits made by the use of the testator's property:—

Held, that the executors were bound to include the books of the firm in the schedule to their affidavit of documents.

ADJOURNED summons on an application on the part of Plaintiff to consider the sufficiency of the affidavit of the Defendants as to the possession of documents, and that, notwithstanding the

objection raised by the Defendants by their affidavit to produce the documents referred to therein, Defendants might be ordered to produce the several documents thereby admitted to be in their possession, with liberty for the Plaintiff to inspect and peruse and take copies and extracts.

The bill was filed by the Plaintiff against the Defendants, the three executors of *Richard Vyse*, for administration of the estate of the testator, who was the Plaintiff's father, and had died in July, 1855. The bill prayed, among other things, an account and payment of the Plaintiff's interest in all sums forming part of the estate employed by Defendants in the partnership business of which the testator had been a member, and of the profits made thereof.

The firm now consisted of two of the three executors and other partners not parties to the suit, including a Mr. *Thirkell*, who had been admitted in 1869. It appeared from the Defendant's answer that they had allowed a considerable part of the testator's estate to remain in the business at compound interest at 5 per cent., as a debt due from the firm to testator's family, and that there had been no complete administration of the estate, but that surplus capital had been from time to time appropriated in payment of legacies.

The Plaintiff, by her interrogatories, required detailed particulars of the capital of the testator employed in the business, and the shares of the several partners, and particulars of the profits. In their answer the Defendants declined to give this discovery, as it could not affect the question whether or not Plaintiff was entitled to such profits, would entail great trouble and expense on Defendants, and would be immaterial if Plaintiff should be held not to be entitled to such profits, while it would be obtained under the decree at the hearing if Plaintiff should be held entitled to such profits; and, moreover, such discovery would affect the interest of persons who were not parties to the suit.

Previous to the affidavit of documents being made by Defendants, Plaintiff's solicitors, on the 29th of January, 1872, wrote to Defendants' solicitors, calling attention to the several documents of which they required production.

By their affidavit as to documents Defendants objected to pro-

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duce—on the ground of their being privileged communications—letters between themselves and their solicitors and *Thirkell* (admitted into the firm in 1869, and) a confidential friend of Defendants and of the family. They also stated that the partnership books and accounts of the firm in their answer mentioned were in their possession or power jointly with the other members of the firm, and were at the several places in which the business was carried on (*London*, *Luton*, *Florence*, and *New York*), and in daily use. Being very numerous, to prepare and set forth a correct schedule of them would occupy much time and labour, and cause very great expense; and Defendants submitted that they were not bound to produce the partnership books and accounts, at least at that stage of the suit, or to set forth a schedule thereof.

Mr. *Kay*, Q.C., and Mr. *Romer*, for Plaintiff:—

The affidavit is insufficient, and the Defendants cannot escape from production, or at all events from giving full information and a list of the documents in their possession, on the ground that the documents and accounts are in the joint possession of the members of the partnership firm: *Clinch* v. *Financial Corporation* (1). As executors they will not be allowed to refuse to set out an account of their receipts and payments, on the ground that it may be decided at the hearing that the Plaintiff is not entitled to the relief claimed: *Thompson* v. *Dunn* (2). The Court may order the Defendants to make a further affidavit where there is reasonable ground for supposing that they have further documents not disclosed by their first affidavit, which may help Plaintiff in making out his case: *Noel* v. *Noel* (3).

Mr. *Amphlett*, Q.C., and Mr. *Rowcliffe*, for Defendants:—

The question is not as to the sufficiency of the affidavit, but whether the Defendants can be compelled to produce documents belonging to a partnership firm of which Defendants are members without the consent of the other partners, who are not parties to the suit. To make such an order would be contrary to the prac-

(1) Law Rep. 2 Eq. 271. (2) Law Rep. 5 Ch. 573.
(3) 1 D. J. & S. 468.

tice of the Court: *Murray* v. *Walter* (1); *Hadley* v. *McDougall* (2); and the Court will accept the statement of the Defendants that these documents are not material to the relief sought by the Plaintiff: *Taylor* v. *Rundell* (3); *Mansell* v. *Feeny* (4). It would be most oppressive and inconvenient to compel us to produce these books and accounts; but we do not object to give a schedule, though it would be useless waste of time and trouble, and also to produce the letters between *Thirkell* and Defendants' solicitors.

Mr. *Kay*, in reply.

Sir James Bacon, V.C.:—

The cases of partnership have not the slightest application, and, I have no hesitation in saying, have nothing to do with this case. The bill is against the Defendants as executors, and that there has been a partnership is an incident in the case to be dealt with hereafter; but it cannot touch the question as to the discovery, which has to be made by means of the affidavit and the production which follows. The production by one partner of the books which are in his possession jointly with the others, who are not parties to the suit, as in the case of *Murray* v. *Walter*, may be an exception; but there is no reason why a schedule, which is a perfect list of all these documents, should not be furnished. It might be necessary for giving the Plaintiff information, so as to enable her to amend her bill, and to get from the Defendants an admission or a denial of the facts on which her case might in some degree depend. The Defendants must make a farther and better affidavit, as in *Noel* v. *Noel* (5), with a list of all partnership documents in the possession of the firm, with especial reference to the letter of Plaintiff's solicitor of the 29th of January, 1872, specifying the documents of which production was required, and relating to the transactions between the testator's estate and the partnership.

Solicitors: Messrs. *Fox & Robinson;* Messrs. *Gregory, Rowcliffes, & Rawle.*

(1) Cr. & Ph. 114.
(2) Law Rep. 7 Ch. 312.
(3) Cr. & Ph. 104.
(4) 2 J. & H. 320.
(5) 1 D. J. & S. 468.

V.-C. B.
1872
March 19.

SUTCLIFFE *v.* RICHARDSON.

[1870 S. 38.]

Will—Legacy—Gift of Life Annuity to a Wife, so long as she and Testator's Son should live together—Death of Son—Non-cesser of Annuity.

Testator by will gave the income of the investment of £8000 to his wife for her life, if she should so long continue his widow. He also gave his son £2000. By a codicil he directed his trustees to pay to his wife "yearly, during her life, £100," in addition to the provision made for her by the will, so long as she and his son should live together; "but if they should cease to reside together," then he directed that the said payment should cease.

The son died in the widow's lifetime, having lived with her until his death:—

Held, that the annuity did not cease on the death of the son.

FURTHER CONSIDERATION.

James Sutcliffe died on the 28th of June, 1864, having by will, dated the 5th of November, 1863, bequeathed as follows:—

"As to the sum of £8000, part of my residuary estate . . . I direct my trustees or trustee to invest the same, and to pay the interest thereof to my wife *Susan* for her life, if she shall so long continue my widow; and subject to the interest given to my said wife, I give the sum of £2000, part thereof, to my son *Edwin Sutcliffe*, the son of my said wife, born before our marriage, for his own use and benefit, to be paid to him on the death or marriage of my said wife, or to such persons as he shall by deed or will appoint."

By a codicil, dated the 19th of June, 1864, the testator directed as follows:—

"I direct my said trustees therein" (*i.e.*, in the will) "mentioned to pay to my wife yearly, during her life, the sum of £100 out of the income of my residuary estate (in addition to the provision made for my said wife by my said will), so long as my said wife and my son *Edwin* should (*sic*) live together; but if they should cease to reside together, then I direct that the said payment should cease."

The testator's son *Edwin* died on the 14th of April, 1869. He lived with the widow, his mother, until his death.

The bill was filed on the 23rd of July, 1870, for execution of the trusts of the will, and the question now, upon further consideration, was, whether, upon the death of the son, the annuity of £100 to the widow ceased. She had not married again.

Mr. *Kay*, Q.C., and Mr. *Jolliffe*, for the Plaintiff.

The VICE-CHANCELLOR called upon

Mr. *Mackeson*, Q.C., and Mr. *T. C. Wright*, for the Defendants, the executors and trustees of the will:—

The gift of the annuity is not a gift for the life of the widow. The object of the testator was to provide for the maintenance of his son. There is no other probable reason why he should have given the widow £100 a year more than he had already given her by the will. He varies his language, and, after giving the widow the annuity during the joint lives, he adds, thinking they might not agree, that if they shall cease to "reside" together, the annuity is to cease.

SIR JAMES BACON, V.C.:—

I cannot agree in the construction of the will which has been contended for.

I think the intention of the testator was to give the widow an annuity out and out for her life. The gift by the will was a gift of the income of £8000 to the widow for life, if she should continue his widow, and this annuity is given to her "during her life . . . in addition to" the provision made by the will.

The testator knew very well in what condition his son was when he was making this provision; he was aware of his state of health, and of other circumstances which may have influenced his decision, and with which I am not acquainted. It is not for me to speculate as to the testator's reasons; but he has said, that if his wife and son should "cease to reside together," the payment of the annuity is to cease.

It has been argued that the death of the son, having put an end to their living together, must have the same effect as their ceasing to reside together would have had. In my opinion I cannot cut down or qualify the extent of the gift to the widow for her life, on

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the ground that a natural accident has prevented the possibility of the son living with the wife. If I were to do so, I should be taking away from the force of the words "to my wife yearly during her life."

There must be a declaration that the widow is entitled for her life to the annuity of £100.

Solicitors for the Plaintiff: Messrs. *Bower & Cotton*, agents for Mr. *Leeming, Halifax.*

Solicitors for the Defendants: Messrs. *Sewell & Edwards*, agents for Messrs. *Hill & Smith, Halifax.*

V.-C. B. 1872 *March* 22.

PICKARD *v.* ANDERSON.

[1871 P. 26.]

Settlement—Power of Investment—"Real or Personal" Security.

Trustees of a marriage settlement were empowered, with consent of the husband and wife, to invest the funds on such security, "either real or personal," as they, with such consent, should think proper.

At the date of the marriage a sum of £2,500, part of the trust funds, was outstanding on the note of hand of the husband, having been advanced to him by the intended wife prior to the marriage. A separation having taken place, but the wife, nevertheless, desiring that the fund should remain in the husband's hands:—

Held, that this investment might be continued until further order on the husband executing a bond to the trustees for the £2,500.

MOTION FOR DECREE.

By the settlement, dated the 1st of June, 1868, made prior to the marriage, which took place on the 3rd of June following, of *Thomas Pickard* and *Sarah Elizabeth Anderson*, it was declared that the trustees should stand possessed of "the principal moneys to be recovered or received under or by virtue of" an indenture of even date, and of a sum of £2500, "and of the moneys, stocks, funds, or securities to be recovered or received under or by virtue of" an assignment thereinbefore contained, "upon trust, with the consent of the said *Thomas Pickard* and *Sarah Elizabeth Anderson*,

and the survivor of them, during their, his, or her lifetime, and from and after the decease of such survivor, at the discretion of the trustees or trustee for the time being, to lay out and invest the said proceeds thereof in their or his names or name, on such security, either real or personal, as the said trustees shall, with such consent as aforesaid, in their absolute discretion, think proper, and do and shall, with such consent or at such discretion as aforesaid, from time to time alter, vary, and transpose the said stocks, funds, and securities into or for other stocks, funds, and securities of the same or a like nature."

The trusts were for the wife, as she should, notwithstanding coverture, generally appoint, and subject thereto, for her separate use, without power of anticipation; then to the survivor for life; then to the children; with an ultimate trust for the wife or her appointees, exclusively of the husband.

At the date of the marriage the £2500 had been lent by *Sarah E. Anderson* to *Thomas Pickard* on his note of hand, and after the marriage it was allowed to remain in his hands. He continued duly to pay or to account for interest on the same at 5 per cent. to his wife down to the 1st of January, 1871.

On the 14th of February, 1871, the bill was filed by Mrs. *Pickard* against the trustees and Mr. *Pickard*, stating that a separation had taken place, and that the trustees alleged and insisted that the trusts of the settlement did not authorize them to leave the £2500 in the hands of Mr. *Pickard*, unless authorized so to do by the Court; and that the Plaintiff was desirous that the £2500 should remain outstanding on the personal security of the husband, she being satisfied with such security; and praying that the trusts of the settlement might be carried into execution.

Mr. *Kay*, Q.C., and Mr. *Martineau*, for the Plaintiff:—

The question is, what is the meaning of the words "real or personal security;" whether "personal" security means the security of personal property, or the security of somebody's personal undertaking.

One of the authorities is *Forbes* v. *Ross* (1), in the year 1788, where the words were "heritable or personal security," and it ap-

(1) 2 Bro. C. C. 430.

V.-C. B. 1872 PICKARD v. ANDERSON.

peared that the testator had been used in his lifetime to place money at interest in the hands of *Ross*, one of the trustees. Lord *Thurlow* allowed the money to remain in the hands of *Ross*, who was a man of property, but directed him to pay the estate £5 per cent. interest.

Another is *Langston* v. *Ollivant* (1), in 1807, where Sir *W. Grant*, M.R., thought that the authority given to the trustees by the words "real or personal security," although the trustees were not rendered answerable except for wilful neglect and default, did not extend to an accommodation, which was what had there taken place.

These cases leave the matter in doubt.

Mr. *Higgins*, Q.C., and Mr. *W. Karslake*, for the Defendants the trustees.

SIR JAMES BACON, V.C.:—

I think that the husband ought to execute a bond.

There will be a declaration that, upon his executing to the trustees a bond for the £2500 and interest at £5 per cent., they, with the consent of the husband and wife, are to be at liberty to continue the £2500 on such security until further order.

The costs of all parties as between solicitor and client will come out of the corpus of the fund; with liberty to apply.

Solicitors for the Plaintiff: Messrs. *Emmets, Watson, & Emmet*, agents for Messrs. *Emmet & Emmet, Halifax.*

Solicitors for the Defendants: Messrs. *Hopwood & Sons.*

(1) Coop. G. 33.

PROSSER *v.* BANK OF ENGLAND.

V.-C. W.
1872
Feb. 19.

[1872 P. 12.]

33 & 34 *Vict. c.* 71, part iv., *s.* 24—14 & 15 *Vict. c.* 99, *s.* 14.—*Bank of England—Fund in the joint Names of Three Persons—Death of One—Proof of Death.*

Evidence which the Court of Chancery may now, in uncontested cases, consider sufficient to prove a death, is not necessarily binding and conclusive upon, or to be accepted as satisfactory by, the *Bank of England.* The bank has a discretion to exercise for its own protection and the benefit of the public; and this Court will not compel it, when exercising that discretion *bonâ fide*, to depart from its own settled practice.

Therefore, an injunction to restrain the bank from requiring an examined copy of a burial certificate purporting to be duly signed was refused.

MOTION.

The bill in this suit stated that by virtue of divers Acts of Parliament, charters, and provisions of Government made for the public benefit, and also for the profit of the Defendants' corporation, it was the duty of the Defendants to keep in proper books the names of all holders of Government annuities, and to enter in such books from time to time the names of all persons to whom any of such annuities had been transferred, so as to shew the amount of such annuities from time to time held by such persons respectively; and when any person in whose name any of such annuities had been standing (either solely or jointly with any other name or names) had died, upon reasonable evidence of such death being given to the Defendants, to denote in the said books such death, to the intent and purpose that the representatives of the deceased, or the survivor or survivors of the persons in whose names such annuities had been standing, as the case might be, might deal with the same by sale and transfer, or otherwise, as they might be advised. Prior and up to the death of *Catherine Prosser* (hereinafter mentioned) a sum of £2960 15*s.* 9*d.* New £3 per Cent. Bank Annuities belonged to her and the Plaintiffs jointly; and such sum was standing in the joint names of the said *Catherine Prosser* and the Plaintiffs in the books of the Defendants. *Catherine Prosser* died on the 17th of December, 1871, and was buried on the 22nd of December, 1871,

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at *Llanvihangel Crucorney*, in the county of *Monmouth*. On the day of her burial, and after the same had been duly entered in the register of burials for the parish of *Llanvihangel Crucorney*, an extract from such entry, purporting to be signed by the officer to whose custody such register was entrusted, was obtained on behalf of the Plaintiffs. On the 3rd of January, 1872, a Mr. *Hugh Roberts*, who had been well acquainted with *Catherine Prosser*, duly made a statutory declaration, to which the extract from the register was annexed as an exhibit.

That declaration (omitting the merely formal parts of it) was as follows:—

"1. I was for two years and upwards, previous to her decease, personally acquainted with *Catherine Prosser*, late of No. 13, *York Place, Albion Road, Stoke Newington*, and afterwards of No. 1, *Park Lane Villas, Stoke Newington*, in the county of *Middlesex*, spinster, deceased, mentioned in the paper writing hereunto annexed marked with the letter A, being an extract from the register book of burials belonging to the parish of *Llanvihangel Crucorney*, in the county of *Monmouth*.

"2. The said *Catherine Prosser* is the same person as *Catherine Prosser* who is mentioned and described in the books kept at the *Bank of England* for the New £3 per Cent. Annuities by the name and description of *Catherine Prosser*, of No. 13, *York Place, Albion Road, Stoke Newington*, spinster, in a joint account with *William James Prosser*, of *Mount Pleasant House, Upper Clapton*, gentleman, and *Harry Curtis Nisbet*, of No. 35, *Lincoln's Inn Fields*, gentleman."

No other sum of New £3 per Cent. Annuities, save the £2960 15*s.* 9*d.* aforesaid, was standing at the dates of her death and the statutory declaration, or either of them, in the books kept by the Defendants, in the name of *Catherine Prosser* jointly with the Plaintiffs.

The Plaintiffs, on the 3rd of January, 1872, duly transmitted the extract and statutory declaration to the Defendants, in order that the latter might enter in the said books the death of *Catherine Prosser*. Until her death had been entered in the books of the Defendants, the Plaintiffs would be unable to deal with the

£2960 15*s.* 9*d.* New £3 per Cent. Annuities, now solely belonging to them on a joint account.

On the 5th of January, 1872, the Defendants gave notice to the Plaintiffs that they would not mark *Catherine Prosser* as dead in their books, alleging as a reason that the statutory declaration did not state that the extract had been compared with the original register for the parish where *Catherine Prosser* had been interred.

The bill then set out a correspondence between the solicitors of the respective parties (to which it is unnecessary more particularly to advert), and proceeded thus: "The Defendants still refused to mark *Catherine Prosser* as dead in their books, or to recognise the right of the Plaintiffs to deal with the sum of £2960 15*s.* 9*d.* New £3 per Cent. Annuities, which sum was still standing in the Defendants' books, as it did prior to the death of *Catherine Prosser*. The Plaintiffs charged that the requisition of the Defendants, to the effect that every extract from a register of burials, duly signed by the proper officer in accordance with the provisions of the 14 & 15 Vict. c. 99, should be further verified by such statutory declaration of examination as hereinbefore referred to, was unjust and unreasonable; and that the Defendants ought to accede to the request of the Plaintiffs of the 3rd of January hereinbefore mentioned without further evidence."

The bill then prayed that it might be declared that the Defendants were not justified in requiring from the Plaintiffs any additional evidence of the death of *Catherine Prosser* beyond that furnished by the Plaintiffs as aforesaid, and that the Defendants ought to enter in their said books against the said sum of £2960 15*s.* 9*d.* New £3 per Cent. Bank Annuities a memorandum of the death of *Catherine Prosser;* that the Defendants might be restrained, under the order and direction of the Court, from permitting the name of *Catherine Prosser* to remain in their said books without the usual memorandum of death marked against it; and that the Defendants might be ordered to pay the costs of the suit.

The bank is a corporation established by Royal charter in 1691, and the management of the National Debt has been entrusted to it by several Acts of Parliament, now consolidated in the *National Debt Act,* 1870. The practice of the Defendants appeared, from the

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evidence in this case, to be as follows:—When they are informed that any person in whose name any stock is standing, either solely or jointly with another or others, is dead, and are called upon to deal with the stock on that footing, they, in the first place, require the person making such request to state in writing the name of the deceased person, with, in the case of a sole account (that is, where stock is standing in a single name), the address and description of the stockholder, and the description and amount of stock; and in the case of a joint account (that is, where stock is standing in the name of a deceased person jointly with any other person or persons), the name of the deceased, with the name or names of his co-stockholder or stockholders, and the description of the stock (1).

The bank next require evidence of death. This, according to long-established practice, may be furnished in either of the three following modes: First: By production of the probate of the stockholder's will. Secondly: By production of letters of administration to the stockholder's estate. Thirdly: By a certified burial extract. In the two first examples no additional evidence of death is required by the bank; but if there is any discrepancy between the name or description of the deceased in the probate or letters of administration and the bank books, explanation of such discrepancy is required to be furnished by a statutory declaration,

(1) (1405) 8/71. REGISTER OFFICE, BANK OF ENGLAND.

Probate, Administration or, Burial Extract of }

Left by (*Name and Address.*)

To prove the Death on the undermentioned Accounts.

	Amount.			Stock.
	£	s.	d.	

In the third example (which applies only to a joint account), and when no probate or grant of administration is produced, the bank require an extract from the proper books relating to the burial of the stockholder, certified and verified as correct by statutory declaration of some competent person; and they also require the identity of the person named in such extract as having been buried with the stockholder to be verified in like manner (1).

The system adopted by the bank of registering the deaths of stockholders has long been in operation. Before the Act which

(1) The declarations prepared and supplied by the bank to persons wishing to prove the death of a stockholder, are generally (omitting the merely formal parts) as follows:—

(251) 8/71.

The Burial Extract certified by the Officiating Minister of the Parish to be here annexed, and declared to be a true copy by some other person.

Christian Name, Residence, and Quality of Declarant, at full length; and if Clerk or Servant, state to whom, and his or her Residence.

do solemnly and sincerely declare, that I have compared the paper writing hereunto annexed, marked with the letter A, with the Register-book of Burials belonging to the Parish of , and that the said paper writing contains a true copy of the entry on the said Register-book of the burial of
late of

And I do further solemnly and sincerely declare, that I well knew and was personally acquainted with the said mentioned in the said paper writing, for years and upwards, previous to decease, and who the same person as who is mentioned and described in the books kept at the *Bank of England*, for the by the name and description of in a joint account with

And I make this solemn declaration, &c. &c.

[Signature of Declarant.]

Declared at
This day of
Before me,
Magistrate for the county of

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substituted declarations for affidavits, the latter were required by the bank.

When the probate or letters of administration, or a burial extract, as the case may be, has been supplied, the stock account of the deceased is referred to, and a mark is made upon it which is technically called "shading" the account. This is intended as a caution to the clerks in the stock office not to allow any dealing with the stock without further order. It operates, in fact, as a notice to them that the death of the party is in course of proof. The death of the party named in the probate, letters of administration, or burial extract, is thereupon entered in a book kept for the purpose in the register office of the bank. In this book the name and description of the deceased are entered, with the amount and description of the stock standing in the stockholder's name, solely or jointly, as the case may be, and the folio of the stock ledger containing the account. The register books are, for convenience, lettered, and each death entered in them bears a distinctive number; and it is stated in the book by which of the before-mentioned three modes the death has been proved. Upon the death being thus recorded in the register office, an officer of that department notes in writing upon the stock account in the stock ledger the death of the party, and this he does by placing the word "deceased," and the reference by letters and number, to the entry in the register against the stockholder's name. The effect of this in the case of a joint account is to leave the stock at the disposal of the survivors or survivor; and in the case of a sole account, at that of the deceased's legal personal representatives.

The account in the stock ledger had in this case been "shaded," but no record of the death of *Catherine Prosser* had been entered in any of the bank books, because the declaration above stated omitted the usual verification of the correctness of the burial extract.

The number of deaths proved at the bank upon accounts of stock by means of burial extracts alone, are, upon the average, about 3000 annually. Those are, in the majority of instances, produced by brokers, and other parties of whom the bank has no knowledge. The signature of the incumbent or curate certifying the extract, and the fact that he is incumbent or curate, are alike unknown to the bank.

By the 33 & 34 Vict. c. 71 (*The National Debt Act*, 1870), part iv., s. 24, it is enacted that the Banks of *England* and *Ireland* respectively, before allowing any transfer of stock, may, if the circumstances of the case appear to them to make it expedient, require evidence of the title of any person claiming a right to make the transfer. That evidence shall be the declaration of competent persons under the *Statutory Declarations Act*, 1835, or of such other nature as the banks respectively require.

By the 14 & 15 Vict. c. 99 (An Act to amend the Law of Evidence), s. 14, it is enacted that whenever any book or other document is of such a public nature as to be admissible in evidence on its mere production from the proper custody, and no statute exists which renders its contents proveable by means of a copy, any copy thereof or extract therefrom shall be admissible in evidence in any Court of justice, or before any person now or hereafter having by law or by consent of parties authority to hear, receive, and examine evidence, provided it be proved to be an examined copy or extract, or provided it purport to be signed and certified as a true copy or extract by the officer to whose custody the original is intrusted, &c.

The question was whether the *Bank of England* could now be compelled to accept as sufficient the evidence of the death of *Catherine Prosser*, to which, for the reasons, and having regard to their practice, as above stated, they objected.

The cause came on to be heard upon a motion for an injunction to restrain the Defendants from permitting the name of *Catherine Prosser* to remain in their books without the usual memorandum of death being marked against it, until the hearing of the cause, or further order.

Mr. *Hardy*, Q.C., and Mr. *E. C. Willis*, in support of the motion, cited 14 & 15 Vict. c. 99, s. 14; 33 & 34 Vict. c. 71, part iv. s. 24, and *Re Hall's Estate* (1). The Plaintiffs here had done what the Lords Justices there held sufficient; and it was both wrong and unreasonable on the part of the bank—as tending to create unnecessary expense to the parties—to call for further evidence to prove the simple fact, aye or no, was *Catherine Prosser* dead? There was

(1) 2 D. M. & G. 748; 9 Hare, App. xvi.

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a distinction between contested and uncontested cases. Evidence which, in the latter, satisfies the Court of Chancery ought to be conclusive and binding upon the bank, who, therefore, should be restrained by the injunction now moved for; and so, in effect, decreed to accept and act upon the declaration tendered to them.

Mr. *Cotton*, Q.C., and Mr. *Kekewich*, for the *Bank of England*, were not called upon.

SIR JOHN WICKENS, V.C.:—

In this case the *Bank of England* refuses to dispense with the particular evidence of death, which the Court of Chancery is in the habit of dispensing with. It would be very convenient if the practice of the bank and the Court were uniform; but it is impossible for me to say that the bank is acting unreasonably because the ancient practice—which, as I understand, has been deliberately retained by the bank since the statute—is more stringent than that of the Court of Chancery. Neither the practice of the bank nor that of this Court is to be looked upon otherwise than as being more or less conventional. The Court of Chancery, as I mentioned during the argument, refuses to take the best evidence of death in cases of this sort, and so I imagine the *Bank of England* could refuse to take the same best evidence of death. It would be impossible for me to say—it would not be respectful of me to say—that the Court of Chancery is irrational, and it is impossible for me to say, under the circumstances, that the *Bank of England* would be irrational, in refusing this best evidence. As a matter of fact, the *Bank of England* having to choose for itself what evidence it shall require, and having the discretion imposed upon it of selecting the evidence which will give a general security (so I understand the Act of 1870), has deliberately come to the conclusion that it requires something more than the mere certificate signed by the curate, or in other words, something more than the Court of Chancery is satisfied with. It is impossible for me to say, and I will not say, that the Court of Chancery is wrong, but it is equally impossible for me to say that the *Bank of England* is wrong. The *Bank of England* has a discretion to exercise; it has exercised it *bonâ fide;* and the exercise of it is not to be inter-

fered with, because the Court of Chancery, in a similar case, would exercise its own discretion in another way.

Mr. *Cotton*:—Then, in fact, that disposes of the suit; and on behalf of the bank I must ask for costs.

SIR JOHN WICKENS, V.C.:—Of course you must have your costs.

Solicitors for the Plaintiffs: Messrs. *Nisbet, Rooke, & Daw.*
Solicitors for the Defendants: Messrs. *Freshfield.*

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[1872 M. 60.]

Permanent Benefit Building Society and Deposit Bank—Publication, containing alleged Libellous Paragraphs—Injunction refused.

A motion on behalf of Plaintiffs, trustees of a permanent benefit building society, being also a bank for deposit, for an injunction to restrain the publication and sale by the Defendants of a book containing alleged libellous paragraphs in reference to the annual balance sheets and solvency of the society was refused.

Dixon v. *Holden* (1) observed upon.

THE Plaintiffs were the trustees of a permanent benefit building society, established and enrolled on the 10th of April, 1851, under the provisions of the statute 6 & 7 Will. 4, c. 32, and the Defendants were the publishers, printers, and author of a book published in February, 1872, at the price of 1*s*. The rules of the society were duly certified by the late *John Tidd Pratt*, barrister-at-law. The Plaintiffs alleged that certain paragraphs in the book in reference to the balance sheets of their society and its solvency, were wholly untrue, and that the statements therein would, if the Defendants should be allowed to continue to publish and sell the book or work, greatly affect the credit and stability of the society, and depreciate its property and assets. The annual reports of the society shewed

(1) Law Rep. 7 Eq. 488.

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that large sums of money were received by the trustees on deposit at interest.

The Plaintiffs prayed that the Defendants might be restrained by injunction from printing, or causing to be printed, and from publishing, selling, or otherwise disposing of, or causing to be published, sold, or otherwise disposed of, any copies of the said book or work, entitled "*Building Societies and Borrowers, and the Royal Commission on Friendly Societies, &c.,*" or otherwise intituled, as in the bill mentioned, and lately written, printed, published, and sold, and now being published and sold by the Defendants, and from advertising, or causing to be advertised, the said book or work, for sale or other disposition. The Plaintiffs also prayed that all the copies of the book or work which remained in the possession or power of the Defendants might be delivered up and be destroyed; and that damages might be awarded to the Plaintiffs in respect of compensation for the injury which they had sustained.

An injunction in terms of the prayer was now moved for.

Mr. *Karslake*, Q.C., and Mr. *Hemings*, for the Plaintiffs:—

The evidence shews that the reputation of the society, established by successful management for more than twenty years, and which is in a sense valuable property, will be seriously affected, if not irreparably damaged, if the book in its present form, and with the paragraphs complained of, be still allowed to be published and sold. It is intended to bring an action for libel with the utmost despatch possible, and it is submitted that in the meantime such reputation ought to be protected by injunction. It is also submitted that the society is carrying on business as a commercial company sufficiently to bring it within the decisions in those cases where protection has been granted against libels which were considered by the Court as calculated to do a grievous injury.

[They referred to *Dixon* v. *Holden* (1); *Springhead Spinning Company* v. *Riley* (2); *Fleming* v. *Newton* (3); *Clark* v. *Freeman* (4); *Routh* v. *Webster* (5); *Maxwell* v. *Hogg* (6); *Lord*

(1) Law Rep. 7 Eq. 488.
(2) Ibid. 6 Eq. 551.
(3) 1 H. L. C. 363.
(4) 11 Beav. 112.
(5) 10 Ibid. 561.
(6) Law Rep. 2 Ch. 307.

Byron v. *Johnston* (1); *Macaulay* v. *Shackell* (2); and *Gee* v. *Pritchard* (3).]

Mr. *Lindley*, Q.C., and Mr. *Westlake*, for the Defendants, were not called upon.

SIR JOHN WICKENS, V.C. :—

But for the case of *Dixon* v. *Holden* (4) I should have considered it perfectly well settled that this Court will not restrain by injunction the publication of a libel. What was said by Lord *Ellenborough* in *Dubost* v. *Beresford* (5), "that the Lord Chancellor would grant an injunction against the exhibition of a libellous picture," has been expressly disavowed by Lord *Campbell* in the case of the *Emperor of Austria* v. *Day* (6), and is inconsistent with the dictum of Lord *Eldon* in the case of *Gee* v. *Pritchard* (7), with that of Lord *Langdale* in *Clark* v. *Freeman* (8), and with that of Sir *L. Shadwell* in *Martin* v. *Wright* (9); and, lastly, it seems to me inconsistent with what may be clearly discovered to have been Lord *Cottenham's* opinion in *Fleming* v. *Newton* (10); for which opinion, it may be observed, he gives very strong reasons.

The case of *Dixon* v. *Holden* has introduced a rule which, if not contrary to the doctrine of these cases, affords at least a very material qualification of it. It was laid down in that case that the Court will restrain the publication of a libel where it affects property, or the potentiality of acquiring property, at least where the potentiality of acquiring property is professional or commercial.

It is not for me to say that the rule so laid down is erroneous; but I think it was wholly new, and that nothing whatever was said in the case of the *Emperor of Austria* v. *Day*, or in any other case, except possibly in the peculiar and very different case of *Springhead Spinning Company* v. *Riley* (11), which supports it in any way.

In *Dixon* v. *Holden* what was restrained was (as the Court considered) an advertisement of an absolutely false statement, calculated to injure a merchant carrying on a large business, and which

(1) 2 Mer. 29.
(2) 1 Bli. (N.S.) 96.
(3) 2 Sw. 402.
(4) Law Rep. 7 Eq. 488.
(5) 2 Camp. 511.
(6) 3 D. F. & J. 217, 239.
(7) 2 Sw. 414.
(8) 11 Beav. 112.
(9) 6 Sim. 297.
(10) 1 H. L. C. 366.
(11) Law Rep. 6 Eq. 551.

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emanated from a discharged solicitor, who had probably acquired his knowledge of the facts while in the employment of the firm, and who appeared to have been actuated by no motive but a malicious one.

In the present case it is unnecessary for me to express an opinion whether the principles of calculation adopted by the Defendant, the author of the book, are true or false; but if they are false, they are false as principles are false, and not false as statements of facts are false. No doubt if they are false the statements which are deduced from them, as to the present value of the funds, are false also; but the statements are only made as deductions. They are, at any rate, very different falsehoods from that which the Defendant in *Dixon* v. *Holden* (1) was held to have been guilty of. And what is complained of is a literary work; not a mere advertisement or publication of an alleged fact. Moreover I can see no proof whatever of actual malice. The author of the book is apparently an enthusiast, who takes strong views as to how the tables of building societies ought to be constructed. It would have been equally efficacious, and in much better taste, if he had not mentioned the Plaintiffs' society by name; and I do not intimate that he may not be liable to damages at law. Whether he is or not is a question on which I carefully abstain from expressing any opinion. But he really seems to have selected the Plaintiffs' society, partly because of its size, partly from his access to its balance sheets, and partly and principally on account of his extreme dissent on scientific grounds from the manager's evidence before the Commissioners on Friendly Societies. That evidence was *publici juris*, and the Defendant had a perfect right to criticise it. According to his view it invited the strongest criticism, and he criticised it with reference to the facts stated in it, and therefore with reference to the application of the principles in contest to the particular figures and conditions of the Plaintiffs' society; though I think he would have acted more wisely and prudently, and better in every way, if he had not mentioned it by name. Lastly, I cannot help doubting whether the position of a society like this is precisely analogous to that of an association in trade. A building society is an association for bringing together borrowers and lenders to the mutual profit of both, and though this society carries on business

(1) Law Rep. 7 Eq. 488.

V.-C. W. 1872 MULKERN v. WARD.

as bankers there is, at least, some question whether this can be considered as trading for a purpose like the present. But however that may be, and assuming every word in *Dixon* v. *Holden* (1) to be absolutely correct, I ought not to interfere in a case like this, while uncertain whether what is stated is false or true, and reasonably certain that there was no malice. Surely, if I granted the injunction, I should do more against the liberty of unlicensed printing, or, as it is commonly called, the liberty of the press, than has ever been done in any decided case, or than properly can be done in this country and in this century. At any rate, I am not prepared to do it, and therefore I refuse the motion.

Solicitors: Mr. *J. Poncione;* Messrs. *Ashurst, Morris, & Co.*

In re INTERNATIONAL CONTRACT COMPANY.

HUGHES' CLAIM.

V.-C. W. 1872 *Feb.* 19; *March* 23.

Company—Creditors—Principal and Surety—Winding-up Order—Payment by Surety — Companies Act, 1862, *s.* 158 — *Ord. of* 11*th November*, 1862, *rr.* 25, 26—*Proof for Indemnity—Interest—Surplus Assets.*

An order to wind up a company fixes the right of its creditors and nullifies, as between them, all contracts for interest.

Therefore, a demand for interest accruing after the order, upon payments made by a surety for the company, will not be admitted to proof by him; but he may take a claim into Chambers for the estimated value of his right to indemnity at the time when the winding up order was made.

Semble, the claim for interest should be made against the surplus assets only of the company, after all its debts (*quâ* principal moneys) are paid.

15 Eq 396

MOTION.

On the 22nd of June, 1866, a petition was presented for an order to wind up the *International Contract Company, Limited*, and on the 9th of July, 1866, an order was made for the purpose.

Mr. *Henry Hughes* claimed to prove against that company for the sums of £100 principal, and £23 7*s.* 6*d.* interest, and £6 4*s.* 2*d.* for costs of an action which had been paid by him to the liquidator of the *West London Wharves and Warehouses Company, Limited*,

(1) Law Rep. 7 Eq. 488.

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making in all the sum of £129 11*s.* 8*d.* The former were the calls made upon twenty shares in the *West London Wharves and Warehouses Company, Limited*, which had been allotted to him, and which were sold by him upon the *Stock Exchange* to the *Contract Company*, but of which no transfer was ever registered prior to the winding-up of the two companies. The calls in question were two of £2 10*s.* each upon the twenty shares, made by the *Wharves Company*, payable on the 5th of June, 1866, and the 27th of November, 1866, with interest in case of default. Mr. *Hughes* did not pay the calls as they became due, as he looked upon the *Contract Company* as the real owners of the shares; and on the 2nd of May, 1867, the shares were forfeited. The liquidator of the *Wharves Company* (which was being wound up voluntarily under the supervision of the Court) sued Mr. *Hughes* at law for the calls. He was obliged to pay not only the principal amount of the calls, viz., the sum of £100, but also the interest above stated, which was calculated at £5 per cent. up to the 5th of May, 1871 (the date when the writ in the action at law was issued), and the £6 4*s.* 2*d.* for the costs of the *Wharves Company*.

Mr. *Hughes* thereupon, on the 9th of January, 1872, carried a claim into Chambers, under the winding-up of the *Contract Company*, for the above-named aggregate sum of £129 11*s.* 8*d.*

Sir John *Wickens*, V.C., then said: "Mr. *Henry Hughes* seems entitled to prove, not only for the principal, but for the interest. Though the non-payment by the *Contract Company* might be unavoidable, it was not the less a breach of duty on the part of the *Contract Company* towards Mr. *Hughes*. As regards the costs, the action was, it would seem, defended for the purpose of taking advantage of the same point as was raised in the case of *McEuen* v. *West London Wharves and Warehouses Company* (1), or, in other words, of throwing on the *Contract Company* the legal liability. A surety cannot claim against the principal the costs of a litigation in which he has attempted to shew that he has been discharged as between him and the creditor: nor can a trustee charge against the *cestuis que trust* the costs of a litigation intended to shew that he was not liable as trustee. Such a litigation is purely for the benefit of the surety, or trustee, and must be paid

(1) Law Rep. 6 Ch. 655.

for by him. It follows that Mr. *Hughes* is entitled to prove for the £23 7*s.* 6*d.*, but not for the £6 4*s.* 2*d.*"

An order was then made which (omitting the merely formal part) was to the following effect:—

The Judge being of opinion that the applicant was entitled to be indemnified by the *Contract Company* in respect of the calls made upon and paid by him on the shares hereinbefore mentioned, it was ordered that the applicant should be at liberty to rank as a creditor of the above-named company for the sum of £123 7*s.* 6*d.*, being the amount paid by him in satisfaction of the respective calls of £2 10*s.* per share on the twenty shares which were held by the applicant in the *Wharves Company* as nominee of and trustee for the above-named *Contract Company*, and the interest which had accrued on such calls respectively to the date of payment thereof; that the official liquidator of the *Contract Company* should pay to the applicant the dividends of 3*s.* and 2*s.* in the £1 on the amount of the said debt (a dividend of the like amount having been declared and paid by the said official liquidator to the other creditors of the said last-named company), and that the official liquidator should, out of the assets of the said last-named company, also pay to the applicant the sum of £5 4*s.* for his ascertained costs of that application.

The matter now came on to be heard on a motion on behalf of the official liquidator of the *Contract Company* for an order to vary that of the 9th of January, 1872, so far as related to the allowance to Mr. *Hughes* of the sum of £23 7*s.* 6*d.*, part of the said sum of £123 7*s.* 6*d.*, being the amount of interest paid by him on the calls hereinbefore mentioned; or that such further or other order might be made in the premises as to the Court should seem meet.

The questions were, whether the proof of Mr. *Hughes* was to include any interest upon either call accruing after the date of the order to wind up the *Contract Company;* and, also, whether it was to include the sum of £6 4*s.* 2*d.* costs paid by Mr. *Hughes* to the *Wharves Company?*

Mr. *Hardy*, Q.C., and Mr. *Whitehorne*, for the motion:—

This case is entirely governed by sect. 158 of the *Companies Act*,

V.-C. W. 1872 — *In re* International Contract Co. — Hughes' Claim.

1862. By that section, in the event of any company being wound up under the Act, all debts payable on a contingency, and all claims against the company, present or future, certain or contingent, ascertained or sounding only in damages, shall be admissible to proof against the company; a just estimate being made, so far as is possible, of the value of all such debts or claims as may be subject to any contingency, or sound only in damages, or for some other reason do not bear a certain value.

Mr. *Hughes'* claim must fall under one or other of these heads. It was, in fact, a claim to indemnity from the *Contract Company* against the payment by him of any calls on the shares, either past, present, or future. That indemnity should be estimated according to its value at the date of the winding-up order. [Order of 11th November, 1862, r. 25.] When that value has been ascertained, the claim for it is a claim in the nature of a specialty debt. But all interest payable even on a specialty debt carrying interest ceases when the winding-up order is made: *In re National Financial Company, Maitland's Case* (1).

The same point arose and was substantially, if not formally, disposed of in *May's Case* (2).

The Vice-Chancellor, Sir *John Stuart*, there declined to make any order on the application before him; but on appeal to the Lords Justices, they, on the 31st of January, 1871, made an order (3).

The short-hand note, however, of what was said by the Court of Appeal on the question of interest is this:—

"Mr. *Higgins*:—The question is, whether the debt bears interest?

"The Lord Justice James:—The calls bear interest; therefore you are to pay what he ought to have paid."

And subsequently—

"The Lord Justice James:—You will calculate the amount of interest.

"Mr. *Dickinson*:—Yes, my lord.

"The Lord Justice James:—The amount to be verified by affidavit.

(1) Law Rep. 3 Ch. 791. (2) 23 L. T. (N.S.) 643.
(3) The case on appeal is not reported.

"Mr. *Dickinson*:—Down to, but not subsequent to, the date of the winding-up.

"The LORD JUSTICE JAMES:—Yes."

This case is identical with *May's Case* (1), and cannot be distinguished in any respect from it. That case is, however, at present under appeal to the House of Lords.

[They also cited *McEuen* v. *West London Wharves and Warehouses Company* (2); *Gen. Ord.* 11th November, 1862 (3); *Ex parte Ashbury* (4); *Warrant Finance Company's Case* (5); *Ebbw Vale Company's Case* (6); *Ex parte Colborne and Strawbridge* (7); *In re Haytor Granite Company* (8).]

The VICE-CHANCELLOR:—The difficulty, Mr. *Hardy*, in this case arises in many respects from the decision in the *Warrant Finance Company's Case*. It may be said that, as from that decision, new law was introduced upon the subject, and that the principle on which that case was determined affords some support to the proposed alteration in my former order in this case.

Mr. *Hardy*:—To allow this claim for interest would be to permit a creditor to fix the amount of what his debtor is to pay him. For instance, if Mr. *Hughes*, instead of proving for his debt, or the estimated value of his claim, as from the winding-up order, postpones his proof, and asks for interest up to the time of actually establishing his claim, why should the company be called on to allow him extra interest for his own laches? That is what it really comes to. After a winding-up order there can be no liability fixed on the company, to which they were not then subject—no new or fresh claim in respect of what they are bound to pay. The rule as to the non-payment of interest after a winding-up order, has been established as regards creditors. No doubt the difficulty and novelty of this case consist in this: that the original contract being one of suretyship and indemnity, must yet, from the nature

(1) 23 L. T. (N.S.) 643.
(2) Law Rep. 6 Ch. 655.
(3) Rules 24, 25, 26, 27.
(4) Law Rep. 5 Eq. 223.
(5) Ibid. 4 Ch. 643.
(6) Law Rep. 5 Ch. 112.
(7) Ibid. 11 Eq. 478–498, 499.
(8) Ibid. 1 Eq. 11, and on app., 1 Ch. 77.

(8) 8 C. 11 Jur. N.S. 899. 12 Jur. N.S. 1.

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of the case, be treated as a question of debtor and creditor. Mr. *Hughes* was either a creditor or not a creditor of the *Contract Company* when it was ordered to be wound up. If he was then a creditor, he is not entitled to interest on his debt after the order. If he was not then a creditor, he was a surety, with a right to an indemnity. He was a possible future creditor, perhaps; but only in respect of an indemnity or contingent claim, which might have been, and can now be ascertained or valued; but on account of which he would not be entitled to any interest after the winding-up order.

Mr. *Mackeson*, Q.C., for Mr. *Hughes*:—

The order of the 9th of January, 1872, is quite correct as to the allowance of interest, and should not be disturbed. *In re National Financial Company* (1) and *May's Case* (2) are both different from this one. There the surety cried out before he was hurt. Not so here. A surety is liable to pay interest, and if he does, he can recover it from his principal: *Executors of Fergus* v. *Gore* (3), which was approved in *Petre* v. *Duncombe* (4). The same principle was recognised in *Ex parte Marshall* (5); *Peter* v. *Rich* (6). But the real question in this case is whether, under the *Companies Act*, 1862, s. 158, a creditor who has a contingent claim against a company must come in and prove for that claim before the winding-up order is made? That is the hard question. The words of the Act are "shall be admissible to proof;" but there is no authority for saying that the claimant must prove at any particular time. Of course, if the Legislature distinctly compels a man to come in by a fixed date, or not at all, he must; but to hold that to be the law here would be very unjust to a person in the position of Mr. *Hughes*, because he might be called on to prove for a claim at a moment when he could not possibly ascertain its value. This case is very different from that of *Horsey's Case* (7), in which *In re Haytor Granite Company* (8) was considered. So also the *Warrant Finance Company's Case* (9)

(1) Law Rep. 4 Ch. 791.
(2) 23 L. T. (N.S.) 643.
(3) 1 Sch. & Lef. 107.
(4) 20 L. J. (Q.B.) 242.
(5) 1 Atk. 262.
(6) Rep. in Ch. 34.
(7) Law Rep. 5 Eq. 561.
(8) Ibid. 1 Eq. 11; 1 Ch. 77.
(9) Law Rep. 4 Ch. 643.

does not apply to this one. Neither does *McEuen* v. *West London Wharves and Warehouses Company* (1). On the whole, this order, giving Mr. *Hughes* leave to prove for the interest, should not so far be varied, and he ought to be allowed the £6 4*s.* 2*d.* for the costs.

Mr. *Hardy*, in reply:—

I am not at all prepared to argue that a creditor must come in to prove for his claim at one particular time, or before the winding-up order. All I say is that, admitting he may come in and prove subsequently, he can only do so on the footing of that *status* which he had when the winding-up order was made: he will make his proof with reference to his rights at that time; he will only be entitled to claim in respect of his original right to an indemnity, and can have nothing more on account of it than he was entitled to at the time of the winding-up order. Looking at all the surrounding circumstances of such a case as this, it may be said that the dividend may be either a pound or a shilling. Possibly. But if a man chooses to wait some time before he carries in his proof, he must not be allowed, on account of the time, to claim more interest than he would be entitled to if he went in at the winding-up. Subsequent events may, perhaps, give him a clearer estimate of the actual value of his proof; but what he must prove for in such a case as this is its estimated value at the time of the winding-up, and no more. To hold otherwise would be to allow of uncertain proofs, to the great injury of a company. "Uncertain," because, leaving the full amount to be claimed against, and paid by, the company to depend upon "when" the claimant might choose to come in and prove. Without, therefore, saying a creditor must come in and prove, under the 158th section and the orders referred to, at any one given time, or be precluded for ever, he must come in when he does on his rights at the time when the winding-up order is made. Those rights in this case gave Mr. *Hughes* only the power to prove for the estimated value of his suretyship indemnity then, and nothing more.

The £6 4*s.* 2*d.* has been disallowed already, and, for the reasons alleged, we ask that the £23 7*s.* 6*d.* may be also disallowed, and

(1) Law Rep. 6 Ch. 655.

V.-C. W. 1872

In re International Contract Co.

Hughes' Claim.

the order of the 9th of January, 1872, discharged or varied accordingly.

March 23. Sir John Wickens, V.C.:—

This case raises a question of some importance, which is said to arise now for the first time in a neat form.

Mr. *Hughes* took twenty shares in the *London Wharves Company*, as nominee of and trustee for the *International Contract Company*. On those shares a call of £2 10*s.* each was made in June, 1866. In July of that year the *International Contract Company* was ordered to be wound up, the call being still unpaid. In November, 1866, another call of £2 10*s.* was made. In May, 1871, the liquidator of the *Wharves Company* (then also under liquidation) brought an action against Mr. *Hughes* for the two calls, amounting to £100, with £23 7*s.* 6*d.* for interest. He obtained judgment for that amount, and £6 4*s.* 2*d.* costs. Mr. *Hughes* paid these sums, and claimed to prove against the *International Contract Company* for the amount. The claim came before me in Chambers, and was disallowed by me as to the costs, but allowed as to the principal and interest; and the official liquidator of the *International Contract Company* now appeals against the allowance of the interest. I may explain that I disallowed the costs as costs incurred by Mr. *Hughes* in seeking to get rid of his liability and throw it on the company, and that I allowed the interest on the simple ground that the contract was to indemnify against both principal and interest; and that the right to sue on it for the amount actually paid could not be affected by the question whether the payment was for the one or the other. It may be stated that dividends, amounting together to 5*s.*, have been already paid to the creditors generally of the *International Contract Company*. The objection to my decision is founded on an artificial rule which has been applied to companies wound up under these Acts; and which, having been laid down by the Lords Justices, is absolutely binding on me. The rule is this: that the winding-up order shall nullify, as between the creditors, all contracts for payment of interest. But after all the creditors are paid their principal debts it leaves the claim for interest to operate

against any surplus. That rule was first laid down in the *Warrant Finance Company's Case* (1). A decision on the point was rendered necessary by that pronounced by the full Court in *In re East of England Banking Company* (2) as to the illegality of the 26th rule, which had been come to in the previous November. No doubt this latter decision only followed what had been laid down by Lord *Westbury*, and followed by the Master of the Rolls, in *In re Herefordshire Banking Company* (3). But the full effect of this, and the consequent necessity for laying down a rule as to interest, seems hardly to have been considered before the *Warrant Finance Company's Case*. That case is to be taken as settling the law on the point, not as merely laying down a rule of practice: *Ex parte Contract Corporation* (4); so that it governs analogous cases, and not only those within its terms. The question before me at present is, whether this rule, relieving (as it does), for certain purposes, an insolvent company in liquidation from a liability to pay interest, relieves it also, for the same purposes, from a contract to indemnify a third person against the payment of interest? If so, the *Warrant Finance Company's Case* was at variance with the *In re National Finance Company* (5), though Lord Justice *Selwyn*, who concurred in the decision of both cases, expressly disclaimed, in the latter, any intention to dissent from any previous decision. Still, if the latter decision is really inconsistent with the former, it must, of course, prevail. It is in all cases difficult to say whether an artificial rule is or is not to be extended to cases analogous to those within it, but not being one of them. The assumed principle on which the *Warrant Finance Company's Case* is made to rest seems to be that every delay in paying debts, after the winding-up order, is to be considered as a delay occasioned by the Court, which, pending that delay, prevents creditors whose debts do not bear interest from converting them into interest-bearing debts; and that consequently the rights of the creditors, as between themselves, are definitively fixed when the winding-up order is made. It would follow that a person having at that time a contingent claim against the company must be entitled to prove for the then

(1) Law Rep. 4 Ch. 643.
(2) Ibid. 4 Ch. 644.
(3) Law Rep. 4 Eq. 250.
(4) Ibid. 3 Ch. 112.
(5) Law Rep. 3 Ch. 791.

V.-C. W. 1872 *In re* International Contract Co. Hughes' Claim.

estimated amount of it, and never acquires any further right, whatever payments he may afterwards make in respect of it; subject always to this—that the amount of the claim is left open to be reconsidered by the light of any circumstances that may arise before the assets are finally distributed; or, in other words, the actual emergence during the winding-up of a debt which was contingent when the order was made, is only material as defining, to some extent, the amount at which the contingency ought to have been estimated, and gives no new right. If that be the true view, the proof in the present case seems wrong, not only as respects the sum for interest, which is, but the sum for principal, which is not, objected to. The proof ought to have been, not for a sum paid for principal and a sum paid for interest, but for the estimated amount of the company's liability at the date of the winding-up order; which I suppose would have been much larger, and which certainly would have been a different sum. The question then arises whether the claim, having been admitted for principal and interest actually paid, can be objected to as regards the latter, only on a principle according to which the whole claim was misconceived; and whether the Court ought to interfere in such a case where the whole sum proved is probably no larger than what might have been properly proved? It seems to me that if the proof for interest had been made as a claim against the surplus only, after all the principal debts are paid, the Court would not have been compelled to disturb it. But as I understand the practice, it must, if admitted, entitle the claimant to immediate dividends; and it therefore becomes necessary to inquire whether he has a right to them. Mr. *Hughes* had, at the date of the winding-up order, a right to indemnity from the *International Company* against any calls which might be made by the *Wharves Company* on the twenty shares for which he was responsible. That, though a right to an indemnity against interest, as well as principal, would not be increased by that circumstance (I exclude the consideration of a fractional sum for interest which may have accrued before the winding-up order). The present value of a liability to pay £100 at a future time is not increased, for the purpose of such a proof, by the fact that, if not paid, it will bear £20 per cent. interest. It was held in

Hawkins v. *Maltby* (1), that in any case the indemnity is against ordinary interest only. But the remark would seem true independently of any such rule. Therefore the circumstance of the calls bearing interest would not have increased the amount of proof. The dividends on such a proof go to a fund which is set apart to answer the possible claim of Mr. *Hughes*. But if Mr. *Hughes*, in consequence of his discharging a liability against which the fund was intended to provide, becomes entitled to part of it, it can only be that part of it which was staked to answer the liability which he discharged. If, for instance, he had been allowed to prove for £200 as the value of his liability at the winding-up, and £25 per cent. on that amount had been carried over to an indemnity fund, he would not, in respect of the payments which he had made, be entitled to £25 per cent. on the principal and interest which he had actually paid, but only £25 per cent. on an aliquot part of the principal sum proved for. Yet the admission of his proof as tendered would give him immediately £25 per cent. on both principal and interest. It seems to me, therefore, that I cannot help deciding the point; and that, even if I should think the rule in question is unjust in its application to a case like the present, and that no such case was contemplated when it was laid down, I must follow it, if it cannot be departed from without disturbing the symmetry of the law. No doubt in *May's Case* (2), which arose in this very winding-up, a view seems to have been adopted by the Court of Appeal not necessarily consistent, and, in fact, apparently inconsistent, with what I consider the principle; but the particular point in question was not argued. No doubt, also, cases might be put shewing that my view would lead to singular or unjust consequences in certain cases. But more singular and more unjust consequences (if the rule in the *Warrant Finance Company's Case* (3) is once admitted) would seem to flow from the contrary view. Therefore I think my own view in Chambers unmaintainable, and I now disallow the claim for the interest; but without prejudice to the Respondent's carrying in, if he thinks fit to do so, a claim for the estimated value of his right to indemnity at the time of the winding-up.

(1) Law Rep. 6 Eq. 505–509; 4 Ch. 200. (2) 23 L. T. (N. S.) 643.
(3) Law Rep. 4 Ch. 643.

V.-C. W. 1872 *In re* INTERNATIONAL CONTRACT CO. HUGHES' CLAIM.

Subject to any objection on the liquidator's part, I propose to give Mr. *Hughes*—whose case is, I understand, a representative one—his costs out of the estate.

Solicitors for the Official Liquidator: Messrs. *Lewis, Munns, & Longden.*

Solicitors for Mr. *Hughes:* Messrs. *Singleton & Tattershall.*

V.-C. W. 1872 *March* 23.

In re WILKINSON'S MORTGAGED ESTATES.

Mortgagee in Possession—Power of Sale—Bill filed for Redemption—Petition under 25 & 26 *Vict.* c. 108*— Sale of Surface separate from Minerals allowed.*

Mortgagees in possession with a power of sale, after filing a bill for foreclosure, and setting down the cause for hearing on motion for a decree, presented a petition, not intituled in the cause, but in the matter of the 25 & 26 Vict. c. 108, for liberty to sell the surface, excepting the mines and minerals, of the hereditaments comprised in the mortgage deeds:—

Held, that they were entitled to the order asked.

PETITION.

By an indenture dated in July, 1841, *George Yeldham Wilkinson* granted and released to *Edward Dodd* certain hereditaments, including *Tapton Mansion House* and other buildings, and a park and grounds adjoining (except the mines and minerals lying under the said lands), to secure the repayment of £3000 and interest. The deed contained the usual proviso for redemption. There were numerous subsequent mortgages of the same property; in some of them the mines and minerals were excepted, and in others they were not. By an indenture in April, 1849, *Dodd*, with the concurrence of *Wilkinson*, assigned his debt and security to the Petitioners *Bell*, who at the same time, on the same security, advanced to *Wilkinson* a sum of £7000. The Petitioners *Bell*, who had obtained assignments of nearly all the subsequent mortgages, entered into possession of the mortgaged hereditaments. Their deeds contained the usual power of sale, and under it they had sold portions of the property to various purchasers. They had also sub-mortgaged to the Petitioner *Herbert.*

Wilkinson had settled the equity of redemption upon himself and his wife for life, and after the death of the survivor, upon the children of the marriage, all of whom had attained the age of twenty-one years.

On the 22nd of April, 1871, the Petitioners *Bell* and *Herbert* filed a bill against *Wilkinson* and his wife and children, and other parties—incumbrancers—praying for the usual accounts of what was due to the Plaintiffs on the several securities mentioned; for payment, or, in default, for foreclosure.

All the Defendants to the suit had appeared, and notice of motion for a decree had been served upon them.

Tapton Mansion House was of immense size, and had not been occupied for upwards of seven years. On the 16th of February, 1872, Mr. *Charles Markham* offered to purchase the mansion house, park, and grounds for the sum of £10,000, and a conditional agreement had been entered into for the sale thereof to him. The Petition, which was not intituled in the cause, but in the matter of the 25 & 26 Vict. c. 108, stated that it would be advantageous to all persons concerned if liberty were given to exercise the power of sale so as that the mansion house and lands could be disposed of; and the Petitioners prayed, first, that as to the mansion house, park, and grounds, they might be at liberty to sell the surface separately from the coals, mines, and minerals in and under the same; and secondly, that as to all the hereditaments comprised in the mortgages, they might be at liberty to sell the surface separately from the coals, mines, and minerals in and under the same.

Mr. *Hardy*, Q.C., and Mr. *Langworthy*, for the Petitioners, submitted that this was a case which came within the provisions of the 25 & 26 Vict. c. 108, notwithstanding that there was a pending foreclosure suit, for this was not a Petition in the suit, but under the statute only; that the Petitioners were, without the aid of the Court, entitled to dispose of the property under their power of sale; and that they only required the aid of the Court for the purpose of exercising that power in the most beneficial manner to the persons interested in the hereditaments, which, being situate in a mining district, it was obvious could be more advantageously disposed of if there were an option to sell the surface separately

V.-C. W. 1872

In re Wilkinson's Mortgaged Estates.

from the minerals. The Court was not asked to sanction any particular contract; and the Petitioners would take upon themselves all the responsibility of any sale. [They referred to *In re Pryse's Estates* (1), *In re Beaumont's Mortgage Trusts* (2), and *Laslett* v. *Cliffe* (3).]

Mr. *C. Hall*, for a puisne incumbrancer, supported the Petition.

Mr. *Davenport*, for the wife and some of the children of the mortgagor, opposed the Petition, contending that no such order as that asked for could be made under the circumstances of this case—a mortgagee's suit having been instituted by the Petitioners, and the cause set down for hearing, and the Petition not being intituled in the cause.

Mr. *Ince*, for a puisne mortgagee, also opposed, submitting that the statute did not apply to mortgagees, the cases cited on behalf of the Petitioners did not apply, the orders there being made on unopposed applications to the Court.

Sir John Wickens, V.C.:—

The decision in *In re Beaumont's Mortgage Trusts* is conclusive to shew that the statute 25 & 26 Vict. c. 108 applies to mortgagees as well as to trustees. I am not asked to sanction any particular contract, which I might have had some difficulty in doing, or to authorize a sale pending a foreclosure suit, which, if my consent were necessary, I should have no difficulty in doing.

The evidence satisfies me that the exercise of the power of sale will be more productive if the surface and mines are sold separately; and, therefore, that there is a *primâ facie* case for giving the leave asked for. I am also satisfied that the order may be made notwithstanding the opposition of one of the later mortgagees, or the mortgagor. In this respect *In re Beaumont's Mortgage Trusts* is an *à fortiori* case, because it was there held that the appearance of the subsequent incumbrancers might be dispensed with. I conceive, therefore, that Vice-Chancellor Sir

(1) Law Rep. 10 Eq. 531. (2) Law Rep. 12 Eq. 86.
(3) 2 Sm. & Giff. 278.

R. Malins would have held, if necessary, that the mortgagor could be dispensed with. But independently of this, I should be most unwilling to lay down a rule which might give a subsequent incumbrancer with the remotest possible interest, or a mortgagor whose equity of redemption might be worth nothing, a position which would enable him to get bought off by refusing to allow the mortgagee to exercise his power of sale in a manner which he thinks on good grounds the most advantageous. It seems to me that I ought to give these mortgagees liberty to exercise their power of sale by selling the surface, excepting as to all the hereditaments comprised in the mortgage deeds generally, the mines and minerals in and under such hereditaments.

Solicitors: Messrs. *Parker, Rooke, & Parkers;* Messrs. *Davies, Campbell, Reeves, & Hooper.*

C. J. B.
1872
March 11.

WM 79 14.
16 Ch D. 498

Ex parte CHARLES.

In re CHARLES.

Bankruptcy Act, 1869, *s.* 6, *sub-s.* 4, *ss.* 59, 80, *sub-s.* 6, *ss.* 125, 126; *Bankruptcy Rules*, 1870, *rr.* 16, 17, 26, 252, 253—*Petition for Liquidation—Adjudication—Jurisdiction—Place of Business.*

C. & Co. had their chief business offices at *Sheffield*, and were tenants of three rooms in *London*, in which an agent carried on business on behalf of the firm.

On *C. & Co.* becoming bankrupt:—

Held, that the Bankruptcy Court at *Sheffield*, and not the Bankruptcy Court in *London*, had jurisdiction in the matter.

THIS was an appeal from an order of the Registrar of the County Court at *Sheffield*, dated the 22nd of January, 1872, adjudicating the Appellant, *W. T. Charles*, jointly with *J. A. Charles*, bankrupt, on a petition filed by Messrs. *Bessemer & Co.*, the act of bankruptcy being the filing of a petition for liquidation by the Messrs. *Charles*, under sect. 125. The petition of Messrs. *Bessemer* was in the usual form (Form 10), and contained the statement that the debtors did not reside or carry on business within the district of the *London* Bankruptcy Court.

The Messrs. *Charles*, as sole partners in the firm of *Wm. Charles & Co.*, carried on a very extensive business as manufacturers of steel and other articles at *Sheffield*, and were tenants under a lease of three rooms, situate at *Walbrook*, in *London*, two of which rooms were occupied by an agent. No stock of goods was kept on these premises, but only some samples of their manufactures. The duty of the agent was to solicit orders for goods on behalf of the firm, for doing which he was paid by commission and also by salary, under the terms of an agreement of the 19th of June, 1869. The firm used to insert the office in *Walbrook* as one of their places of business on their invoices and bill heads. The question for the Court was, which of the two Courts, the *London* Bankruptcy Court or the *Sheffield* Bankruptcy Court, had jurisdiction in the matter.

Mr. *Little*, Q.C., and Mr. *Winslow*, for the Appellant, *W. T. Charles*:—

The effect of sect. 59 is to attach to the *London* Bankruptcy Court a general jurisdiction, in case of the bankrupt residing or carrying on business within its limits. The petition proceeds on an allegation which is shewn by the evidence to be unfounded. Under the Bankruptcy Act of 1849 (12 & 13 Vict. c. 106), s. 6, there was one Court in Bankruptcy; now the unity of the Court has gone, and instead thereof we have the several Courts created by the Act of 1869, under which Act great care has been taken to define in what Court the bankruptcy shall be carried on. Where there is a doubt as to the validity of the act of bankruptcy on which the adjudication is founded, the trustee will have difficulty in disposing of the property.

[They also referred to sect. 6 of the *Bankruptcy Act*, 1869, sub-sect. 4, Form 1; sect. 80, sub-sect. 6; sects. 125, 126; and to the Bankruptcy Rules, 1870, rr. 16, 17, 26, 252, 253, and Form 106.]

Mr. *De Gex*, Q.C., and the Hon. *A. Thesiger*, for Messrs. *Bessemer* and the trustee under the bankruptcy, were not called upon.

SIR JAMES BACON, C.J.:—

I am of opinion that the occupation of rooms in *Walbrook* by an agent, on behalf of the Messrs. *Charles* is not a carrying on of business in the district of the *London* Bankruptcy Court within the meaning of the words of the *Bankruptcy Act*, 1869. The words of the Act are plain and precise, and business, in the proper sense of the word, the bankrupts did not carry on in *London*. I am of opinion that the proceedings were rightly commenced in the County Court of *Sheffield*, and the appeal must be dismissed with costs.

Solicitors: Messrs. *Abrahams & Roffey*; Messrs. *Johnson & Weatheralls*, agents for Messrs. *Burdekin, Smith, & Pye Smith, Sheffield.*

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AGREEMENT BY LETTERS—*Agreement for Lease—Memorandum in Writing—Statute of Frauds.*]

AGREEMENT BY LETTERS—*continued.*

A bill for specific performance alleged a verbal agreement for the lease of a house by the Plaintiff to the Defendant for seven years from Michaelmas, 1870, followed, first, by a letter from the Defendant to the Plaintiff, which did not state when the term was to commence, and, secondly, by another letter of the Defendant to the Plaintiff, in which, after referring to the previous letter, the Defendant stated that he thought it best to say that it was clearly understood on his part, that the Plaintiff agreed to let the house for seven years from Michaelmas, 1870, upon certain conditions therein mentioned, some of which the Plaintiff did not admit to form part of the alleged verbal agreement:—*Held*, that neither the first letter, nor the two together, constituted a memorandum in writing of the alleged agreement sufficient to satisfy the requirements of the *Statute of Frauds*. Nesham *v.* Selby - - - - - - 191

AGREEMENT FOR MORTGAGE—*Specific Performance.*] Where the Defendant had agreed to execute to the Plaintiff a mortgage of certain leasehold premises in the usual form, containing an absolute power of sale, in consideration of money due, and had, when requested to do so, failed to execute such mortgage: The Court made a decree for specific performance. Ashton *v.* Corrigan - - - - - - 76

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APPLICATION FOR SHARES—*continued.*

the case was similar to that of an application for shares in the name of a fictitious person, and that the name of *S.* must be substituted for *P.* in the list of contributories.—An application for shares in a false name puts a man in the same position as regards liability, as a transfer into a false name. —Depositions taken under the 115th section of the *Companies Act*, 1862, may be used as evidence on a summons against the party by whom they have been made; but, *semble*, notice of the intention to read them should be given. *In re* Hercules Insurance Company. Pugh and Sharman's Case [566

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BANKING COMPANY—Shares—Liability of trustees - - - - - - 232
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BANKRUPT TRANSFEREE—*Transfer of Shares—Winding-up of Company—Creditors' Deed by Transferee—Liability to indemnify Transferor against Calls not proveable—Bankruptcy Act*, 1861, *sects.* 153, 154—*Plea.*] After a transferor of shares in a limited company had executed the deed of transfer, but before the transferee had executed and registered it, the company was ordered to be wound up. About three months after the date of the winding-up order the transferee executed a deed of inspectorship under the 192nd section of the *Bankruptcy Act*, 1861, which was duly registered, and contained the usual stipulations for a release, and the name of the transferor was inserted in the accounts delivered to the Chief Registrar with the deed as a creditor for the purchase-money. The transferor had been placed on the list of contributories, and had paid calls. The transferee died, and the three Defendants were his legal personal representatives. The transferor filed a creditor's bill against the representatives of the transferee, praying a declaration that the transferee's estate was liable for the amount of the calls:—*Held*, that the Plaintiff's claim could not have been proved under the deed, and a plea of the deed was consequently overruled. Holmes *v.* Symons - - - 66

BANKRUPTCY—Annulment—Clause of forfeiture - - - - - - 413
See Forfeiture Clause. 1.

—— Disclaimer by trustee—Onerous property 186
See Disclaimer by Trustee in Bankruptcy.

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—— Forfeiture clause—Liquidation by arrangement - - - - - - 464
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—— Injunction - - - - 311
See Injunction in Bankruptcy.

—— Order and disposition—Policies of insurance - - - - - 188
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—— Petitioning creditor's debt - - 309
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—— Place of business of bankrupt—Jurisdiction of District Court - - 638
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—— Proof—Transferee of shares—Liability to indemnify transferor - - 66
See Bankrupt Transferee.

BANNS—Undue publication of - - 369
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BILL OF DISCOVERY—Libel in newspaper—Proprietors' names - - - 394
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See Pledge of Chattels in Scotland.

BREACH OF TRUST BY TESTATOR—*Liability of Executors—Distribution of Assets under* 22 & 23 *Vict. c.* 35, *s.* 29—*Advertisements for Claims.*] The executors of a testator, whose estate was liable to replace trust money in consequence of a breach of trust:—*Held*, not protected from liability under 22 & 23 Vict. c. 35, s. 29, they having only issued notices for claims against the testator's estate, to be sent in within three weeks, by advertisement in local newspapers in the neighbourhood where the testator resided, and not in the *London Gazette*. Wood *v.* Weightman - - 434

BRICK-FIELD—Royalties—Tenant for life and remainderman - - - 263
See Royalty.

BUILDER — Summons against — Metropolis Management Act - - - 339
See General Line of Buildings.

BUILDING CONTRACT — *Arbitration Clause—Agreement as to price between Architect and Employer — Extra Works — Complicated Account—Jurisdiction.*] An architect entered into an undertaking with his employer that a house should be erected for a sum not exceeding £15,000, including architect's commission and all expenses, and engaged the services of a builder who, without being informed of the undertaking, gave an estimate based on quantities given him by the architect, and entered into a contract with the employer for the completion of the work from the architect's plans, and under his superintendence, for £13,690, with power for the architect to order extra works, and with a clause providing that all questions between the parties under the contract should be settled by the award of the architect—On a suit by the builder claiming to be entitled to be paid by the employer for all quantities executed by him beyond those included in his estimate, and for extra works:—*Held*, that the account was too complicated to be taken at law, and ought to be taken in this Court:—*Held*, also, that on the evidence the architect was the agent of the employer; that his undertaking having been concealed from the builder, the arbitration clause in the contract could not be enforced; and that the Plaintiff was entitled to an account for what was due to him for any works executed by him under the architect's direction not included in the contract, and for any works so executed under the contract the price for which was not therein included, and for any variations made under the architect's direction of works included in the contract. Kimberley *v.* Dick - - 1

BUILDING SOCIETY—Libellous—Publication against - - - - 619
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—— Mortgage to, by executors - - 555
See Mortgage by Executors.

CALLS—Anticipation of - - - 255
See Directors' Fees.

—— Indemnity against—Proof under creditors' deed - - - - 66
See Bankrupt Transferee.

CANCELLATION OF SHARES — *Winding-up—Contributory—Power of Directors to relieve from Contract—Ultrà Vires.*] The directors of a limited company, who were authorized by their articles "to enter into, alter, rescind, or abandon contracts, in such manner as they should think

CANCELLATION OF SHARES—*continued.*

fit," and also, by another clause in their articles, with the previous sanction of a general meeting, to purchase the company's shares, or reduce or cancel unissued or forfeited shares, accepted an offer from *T.*, their paid secretary, to take 1000 shares in order to raise money for the purposes of the company. After *T.* had taken and paid for 850 of the shares, he resigned his secretaryship, and the directors, in consideration of his resignation, resolved to relieve him from further payments in respect of such shares as he had agreed to take. The company was subsequently wound up:—*Held*, that the directors had not acted *ultrà vires* in relieving *T.* from his obligation, and that *T.* was not a contributory. *In re* Nanteos Consols Company. Thomas' Case - - 437

2.——*Winding-up—Contributory—Allotment—Attempted Withdrawal.*] Upon the purchase of the business of company *A.*, and amalgamation with the purchasing company (*B.*), the shareholders in company *A.* were entitled to receive shares in the amalgamated company in exchange for the shares held by them in company *A.*, and a form of application was sent to the *A.* shareholders for their signature, requesting an allotment of shares in the amalgamated company, with an agreement to accept the same, and an authority to insert their names in the register of shareholders. —*X.*, one of the *A.* directors and shareholders, signed the form of application for fifty shares, and a resolution was passed on the 22nd of April, 1869, and confirmed on the 29th, for allotting the same to him. On the 15th of May *X.* wrote withdrawing his application, as he had determined to take no shares, requesting the directors not to allot any shares to him, and to return his application. The consideration of this letter was from time to time postponed, and *X.* was put off with assurances that no shares had been allotted to him. On the 15th of August, in answer to a letter from *X.*'s solicitor, threatening immediate legal proceedings to restrain the company from placing his name on the register as a shareholder, unless the promised minute cancelling his application for shares was received by return of post, the solicitor of the company wrote stating that at the last meeting of the directors "a resolution was passed cancelling the allotment of shares to" *X.* No entry of such a resolution was to be found in the minute books, and its existence was denied by one of the directors who was present at the meetings before and after the 15th of August: *Held*, that *X.* was liable as a contributory, the allotment of shares to him being complete by the terms of the arrangement between the two companies, as soon as the resolution acceding to his application was entered in the book; and that, independently of there being no evidence that the allotment was ever cancelled, the directors had no power to release a shareholder who wished to have his shares cancelled. *In re* United Ports Company Adams' Case. - - 474

CAPITAL AND INCOME—Royalties - 263
See Royalty.

CASES—*Aston* v. *Meredith* (Law Rep. 11 Eq. 601) not followed - - - 406
See Partition Suit. 4.

CASES—*continued.*

—— *Case* v. *Drosier* (5 My. & Cr. 246) followed
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—— *D'Almaine* v. *Moseley* (1 Drew. 629) followed
See Conversion. 2. [133

—— *Dixon* v. *Holden* (Law Rep. 7 Eq. 488) observed upon - - - 619
See Injury to Reputation.

—— *Dunnage* v. *White* (1 Jac. & W. 583) followed - - - - 133
See Conversion. 2.

—— *Earlom* v. *Saunders* (Amb. 240) distinguished - - - - 23
See Conversion. 1.

—— *Lloyd* v *Lloyd* (Law Rep. 2 Eq. 722) distinguished - - - - 413
See Forfeiture Clause. 1.

—— *Maryport Railway Act, In re* (32 Beav. 397) doubted and not followed - - 334
See Costs under Lands Clauses Act. 1.

—— *Mildred* v. *Austin* (Law Rep. 8 Eq. 220) disapproved of - - - 210
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—— *Richardson, In re* (Law Rep. 12 Eq. 398) varied - - - - 142
See Land Registry Act.

—— *St. Germans (Earl)* v. *Crystal Palace Railway Company* (Law Rep. 11 Eq. 568) not followed - - - - 261
See Vendor's Lien against Railway Company. 1.

—— *Smith's Case* (Law Rep. 4 Ch. 611) distinguished - - - - 529
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—— *Swift* v. *Swift* (34 Beav. 394) considered 511
See Separation Deed.

—— *Teal* v. *Watts* (Law Rep. 11 Eq. 213) followed - - - - 406
See Partition Suit. 4.

—— *Vansittart* v. *Vansittart* (2 De G. & J. 249) considered - - - - 511
See Separation Deed.

—— *White* v. *Chitty* (Law Rep. 1 Eq. 372) distinguished - - - - 413
See Forfeiture Clause. 1.

CERTIFICATE—Defective suit—Taking off file
See Revivor and Supplement. 2. [202

CESSER OF ANNUITY—*Will—Legacy—Gift of Life Annuity to a Wife, so long as she and Testator's Son should live together—Death of Son.*] Testator by will gave the income of the investment of £8000 to his wife for her life, if she should so long continue his widow. He also gave his son £2000. By a codicil he directed his trustees to pay to his wife "yearly, during her life, £100," in addition to the provision made for her by the will, so long as she and his son should live together; "but if they should cease to reside together," then he directed that the said payment should cease.—The son died in the widow's lifetime, having lived with her until his death:—*Held*, that the annuity did not cease on the death of the son. Sutcliffe *v.* Richardson 606

CHAMBERS—Practice in - - - 349
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CHARGE—Solicitor's lien—Property preserved 497
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CHEQUE—Gift of—*Donatio mortis causâ* - 489
See Donatio Mortis Causâ.

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CODICIL—Republication of will - - 381
See Republication of Will.

COLLEGE—Statutes—Discovery - - 269
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COLLUSION—Undue publication of banns—Evidence - - - - 369
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COMMISSION IN ARMY—Abolition of purchase - - - - 250
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COMPANY—Acceptance of shares—Allotment posted but not received - - 148
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—— Application for shares—Fictitious name 566
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—— Cancellation of shares - - 437, 474
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—— Director—Qualification—Allotment committee - - - - - 30
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—— Directors' fees - - - - 255
See Directors' Fees.

—— Misrepresentation in prospectus - 79
See Misrepresentation in Prospectus.

—— Railway—Costs under Lands Clauses Act [334, 495
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—— Subscriber to memorandum - - 228
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—— Transfer of shares—Custom of Stock Exchange - - - - 203
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—— Unpaid landowner—Lien - 261, 524
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—— Unregistered life insurance company—Limitation of liability - - 547
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—— Winding-up—Interest - - 623
See Interest in Winding-up.

—— Winding-up—Liability for indemnity against calls - - - - - 66
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—— Winding-up—Special Examiner - 27
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CONCEALMENT OF MATERIAL FACT—Prospectus of company - - 79
See Misrepresentation in Prospectus.

CONDITION—Annuity to wife so long as she should live with her son - - 606
See Cesser of Annuity.

CONDITIONS OF SALE—*Vendor and Purchaser—Sale by Court of Chancery—Condition not to object to Title prior to Document chosen as root of Title—Prior Title bad—Specific Performance.*] A sale was made by the Court of Chancery under conditions which precluded the purchaser from objecting to the title prior to the document chosen as root of title, and made recitals in deeds more than twenty years old conclusive. A recital covered by this condition was so framed as to conceal a defect of title prior to the date fixed for commencement of title. The purchaser inquired into the prior title, and refused to complete on the ground that the prior title was bad; and the Court being of opinion that such objection was well founded:—*Held*, that, the sale being by the Court, the purchaser was not precluded by the conditions from raising the objection, and ought to be discharged from his purchase.—Whether a similar decision would be given in the case of an ordinary sale, *quære*. Else *v.* Else 196

CONFIRMATION OF SALES ACT (25 & 26 *Vict. c.* 108), *s.* 2.—*Sale of Surface, Reserving Minerals—Petition by Trustees alone for Sanction of Court—Parties—Cestuis que Trust made Co-Petitioners.*] The *cestuis que trust* ought to be made parties to an application under 25 & 26 Vict. c. 108, s. 2, for sale of the surface apart from the minerals. *In re* Palmer's Will - - - - 408

2.——*Mortgagee in Possession—Power of Sale—Bill filed for Redemption—Petition under* 25 & 26 *Vict. c.* 108—*Sale of Surface separate from Minerals allowed.*] Mortgagees in possession with a power of sale, after filing a bill for foreclosure, and setting down the cause for hearing on motion for a decree, presented a petition, not intituled in the cause, but in the matter of the 25 & 26 Vict. c. 108, for liberty to sell the surface, excepting the mines and minerals, of the hereditaments comprised in the mortgage deeds:—*Held*, that they were entitled to the order asked. *In re* Wilkinson's Mortgaged Estates - - 634

CONSUMABLE ARTICLES—Gift of, by will—Farming stock - - - 432
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CONTINUING GUARANTEE—*General Guarantee under Seal—Withdrawal of Guarantee.*] A father, being desirous of obtaining advances for his son from a bank, gave the son a promissory note for £2000, and gave the bank an agreement under seal to this effect, that, in consideration of the bank discounting the note for £2000 for his son, certain deeds and documents which the father deposited with the bank should remain with the bank as security for the payment of all money due or to become due from the son to the bank on any account whatsoever; and that he would pay the bank upon demand all such money, and he thereby charged the property comprised in such documents with the repayment thereof:—*Held*, that this agreement was not limited to the £2000, but was a continuing guarantee for all money already due, or which should become due from the son to the bank.—*Semble*, that a general guarantee under seal may, under certain circumstances, be withdrawn upon the terms of paying all that may be due under it at the time of giving notice of withdrawal. Burgess *v.* Eve - 450

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—— Notice of allotment—Letter posted but not received - - - - 148
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—— Refusal to give information—Summons to examine witness - - 178, 179, n.
See WITNESS IN WINDING-UP. 1, 2.

—— Subscriber to memorandum - - 228
See SUBSCRIBER TO MEMORANDUM.

CONVERSION—*Settlement—Power of Sale and Reinvestment—Proceeds of Sale, whether Realty or Personalty.*] By a marriage settlement lands were conveyed to trustees to the use of all the children equally, and his, her, and their heirs and assigns, with a power of sale, and a direction that the proceeds should be laid out in the purchase of other lands, or on government or real securities, which, when purchased, should be made liable to the same trusts, estates, and limitations as were declared of the trust premises. The lands were sold and the proceeds invested on mortgage:—*Held*, that the proceeds of the sale must be treated as personalty and not as realty.—*Earlom* v. *Saunders* (Amb. 240) distinguished. ATWELL *v.* ATWELL - - - - - 23

2. —— *Will—Construction—Devise and Bequest of Estate and Effects to Trustees, their Heirs, Executors, and Administrators—Trusts applicable to Personalty only—Real Estate—Resulting Trust.*] A testator devised and bequeathed all his estate and effects to trustees, their heirs, executors, and administrators, upon trust to convert his personal estate, not being money, and to stand possessed of the money to arise by such sale, and of the rest and residue of his estate and effects upon trust to invest the same in Government or real securities, and to stand possessed of such investments upon trusts for the benefit of the widow and children and brothers and sisters of the testator:—*Held*, that the real estate of the testator passed to the trustees, but that the beneficial interest therein was undisposed of by the will, and consequently resulted to the testator's heir.—*Dunnage* v. *White* (1 Jac. & W. 583) followed. *D'Almaine* v. *Moseley* (1 Drew. 629) considered. LONGLEY *v.* LONGLEY [133

3. —— *Will—Navigation Shares—Personal Estate and Effects.*] After a devise of "all my real estate" upon certain trusts, testator appointed *E.* his executor, and gave to him "all my railway, canal, and navigation shares, moneys, and personal estate" upon trust for payment of debts and legacies, and gave "the residue and overplus of my personal estate and effects," after the payments thereinbefore mentioned, unto *C.*, her executors and administrators, absolutely.—The

CONVERSION—*continued.*

navigation undertaking, in which testator held two shares, became vested in a railway company under an Act of Parliament which provided for the extinguishment of the freehold rights in the shares upon a conveyance to the railway company by the holder, who was to be thereupon entitled to receive shares in the railway company. No conveyance of the shares to the railway company was executed by testator, and they were at his death standing in his name in the share register of the navigation company in possession of the railway company:—*Held*, that the effect of the Act of Parliament was to convert the shares into personal estate, but that even if unconverted, they would pass under the residuary gift of testator's personal estate and effects. CADMAN *v.* CADMAN - - - - - 470

—— Locke King's Act—Interest on land - 218
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—— Foreclosure suit—Parties—Judgment creditors - - - - - 210
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—— Lands Clauses Act - - 334, 495
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—— Mortgage—Administration suit by mortgagee—Summary payment - - 176
See MORTGAGE OF REVERSION.

—— Motion reserved till the hearing - 401
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—— Motion reserved till the hearing - 53
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—— Taxation—Returning officer for election of school board - - - 336
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—— Trustee severing from co-trustees - 369
See UNDUE PUBLICATION OF BANNS.

—— Winding-up—B list - - - 388
See COSTS IN WINDING-UP.

COSTS IN THE CAUSE—*Practice—Unsuccessful Motion.*] In a partnership suit Plaintiff moved for a receiver and injunction, and the motion, which was opposed by Defendant, was ordered to stand till the hearing, upon an undertaking by both parties to concur in transferring the partnership account to the bankers of the firm, and to pay to such account all assets of the firm that should reach their hands, and not to pay or apply any of the partnership assets except for partnership purposes. No directions were given by the Court as to the costs of the motion. The common order dismissing the bill for want of prosecution was subsequently obtained on Defendant's application, the Court refusing to make any order as to the costs of the motion for a receiver:—*Held*, that these costs were costs of an unsuccessful motion, and as such, costs in the cause, payable by Plaintiff. CORCORAN *v.* WITT - - 53

COSTS UNDER LANDS CLAUSES ACT—*Railway Company—Lands taken by different Companies—Permanent Investment of Purchase-money.*] Portions of lands belonging to a corporation were taken by four different companies, the undertakings of three of which afterwards became united:—*Held*, that the costs of a joint permanent investment of the purchase-moneys must be borne in halves by the subsisting companies.—*In re Maryport Railway Act* (32 Beav. 397) doubted and not followed. *Ex parte* Corpus Christi College, Oxford - - - - 334

2. —— *Reinvestment—Costs.*] On the petition of all parties interested a railway company was ordered to pay the costs of a reinvestment in freeholds of a fund in Court representing the proceeds of leasehold houses taken by the company. *In re* Parker's Estate - - - - 495

COSTS IN WINDING-UP—*Past Members—Companies Act*, 1862, *s.* 38.] Past members of a company settled upon the B list of contributories having bought up the debts to which they were liable, *held* liable to pay the costs of settling the B list, unless the liquidator had money in his hands sufficient to pay them. *In re* Greening & Co. Marsh's Case - - - - 388

COVENANT—Separation deed—What are lawful
See Separation Deed. [511

—— To settle future property - - 295
See Covenant to settle.

COVENANT TO SETTLE—*After-acquired Property—Will—Devise of Real Estate—Tenant for Life—Reversionary Interest—Marriage Settlement—Conversion—"Entitled" in sense of "Entitled in Possession."*] *H. F. C.*, who died in 1852, by will gave real estates to trustees upon trusts for his wife for life, and, after her decease, for the benefit of his unmarried daughters. He gave power to the trustees after the decease of his wife, or the decease or marriage of all his daughters, or earlier, with the consent of his wife, or, if she should be dead, of his unmarried daughters, to sell the estates; and they were to invest the moneys and to pay the income to his wife for life, and, after her decease, to divide the principal moneys amongst such of his daughters as should be living at his decease, equally, as tenants in common. He left five daughters surviving. *L.*, one of them, in 1853 married *W.*, and *I.*, another of them, in 1858 married *H.*—By the settlement made on the marriage of *I.* and *H.* she assigned to trustees certain trust funds and premises upon trusts during their joint lives to pay the income to her for her separate use, and, after the decease of either, to pay it to the survivor for life, and after the decease of the survivor upon trusts for the benefit of the children or remoter issue, as they should jointly appoint; and in default of such appointment, as the survivor should appoint; and in default, for the benefit of the children equally. The settlement contained a covenant by the husband and wife, that if, at any time after the marriage, and during their joint lives, they, or either of them in her right, should by gift, descent, succession, or otherwise, become entitled to any real or personal estate, property, or effects of the value of £100 or upwards, at any one time, the same should be conveyed, transferred, assured, and paid to the trustees upon the trusts declared. The testator's estates were, in 1867, with the consent of his widow, sold by the trustees, and they invested the proceeds in *East India Government Stock*. The widow died in April, 1871, leaving *I.* and *H.* surviving. By the settlement made on the marriage of *L.* and *W.*, she assigned to trustees certain trust funds and personal estate upon trusts similar to those, and there was a covenant similar to that contained in the settlement of *I.* and *H.* *L.* died in January, 1865, without having concurred in exercising the joint power of appointment. *W.* died in January, 1871. By will he appointed the trust funds and personal estate settled by his late wife.—The trustees of *H. F. C.'s* will sold the stock, and paid into Court, to a credit in *I.* and *H.'s* matter, the sum of £2290 18*s.*; and *I.* and *H.*, by their Petition, prayed that it might be paid to *H.* The same trustees paid into Court, to a credit in *L.* and *W.'s* matter, a similar sum and some apportioned dividends; and the two surviving trustees of *L.* & *W.'s* settlement (who were also two of the trustees and executors of *W.'s* will), and the children of the marriage, by their Petition, prayed that it might be paid to the trustees of the settlement:—*Held*, that "entitled" must be read "entitled in possession," and therefore that the fund in *I.* and *H.'s* matter was bound by the covenant, and must go to the trustees of the settlement, the required change in the property having taken place during the coverture; and that the fund in *L.* and *W.'s* matter was not bound by the covenant, and must go to *W.'s* legal personal representatives, there having been no change in the property during the coverture. *In re* Clinton's Trust: Hollway's Fund. The Same: Weare's Fund - - - 295

CREDITORS' DEED—Injunction against, by creditor in *Ireland* - - - 311
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—— Plea of—Bill against transferee of shares 66
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CROSS-EXAMINATION—Motion reserved till hearing - - - - 401
See Motion reserved till the Hearing.

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See French Curator Bonis.

CUSTODY OF CHILDREN—Separation - 511
See Separation Deed.

CUSTOM OF STOCK EXCHANGE—*Transfer of Shares—Infant Transferee—Liability of Jobber.*] A jobber or dealer in shares on the *Stock Exchange* contracted to purchase the Plaintiff's shares in a company, and gave in to the Plaintiff's brokers a ticket with the name of the intended transferee, which had been passed on to him. After the execution of the transfer it was discovered that the transferee was an infant, of which neither party was previously aware; and the Plaintiff became liable for calls. In a suit by the Plaintiff against the jobber, seeking to make him liable to indemnify him in respect of the shares:—*Held*, that, as by the usage of the *Stock Exchange* the jobber was, in the absence of fraud, discharged from liability when he had given the name of the

CUSTOM OF STOCK EXCHANGE—*continued.*
transferee and paid for the shares, and as he had given all the further information required by the vendor, the suit against him could not be sustained. RENNIE *v.* MORRIS - - - 203

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DEPOSIT OF DEEDS—Lease of land in *Scotland* [597
See PLEDGE OF CHATTELS IN SCOTLAND.

DEVASTAVIT—*Legacy to Infant—Charge on Real Estate if Personal Estate deficient—Time when Deficiency to be ascertained.*] Where a legacy to an infant, with interest for maintenance till twenty-one, was charged on a testator's real estate, if the personal estate should be inadequate, and the personal estate was sufficient for all the purposes of the will at the time of the testator's death, but was subsequently wasted by the testator's personal representative:—*Held*, that the legacy could not, on the infant attaining twenty-one, be made chargeable on the real estate. RICHARDSON *v.* MORTON - - - 123

DIRECTOR—Acceptance of office—Resignation
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—— Liability for qualification - - 30
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—— Power to release shareholder - 437, 474
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DIRECTORS' FEES—*Company—Fraudulent Preference.*] Under a power in the articles of association to receive payment of calls in advance, the directors of a company paid into the bank the amount remaining uncalled on their shares, and on the same day appropriated the money in payment of their fees, for which there were at the time, as they knew, no available assets:—*Held*, that the effect of the transaction was that there had been no *bonâ fide* payment in anticipation of calls, and that the directors, who were bound to exercise the powers given to them for the benefit of the company generally, and not with a view to their own private interests only, were not relieved from liability upon their shares. *In re* EUROPEAN CENTRAL RAILWAY COMPANY. SYKES' CASE 255

DISCHARGE OF SOLICITOR—Lien - - 440
See SOLICITOR'S LIEN. 1.

DISCLAIMER BY TRUSTEE IN BANKRUPTCY—*Bankruptcy Act*, 1869, *s.* 23—*Rule* 28 *of the Rules of July* 7, 1871—*Onerous Property—Leasehold Interest—Leave of Court—Special Form of Order.*] In cases where the property acquired by the trustee under the *Bankruptcy Act*, 1869, consists of leasehold interests, the Court will exercise its discretion in allowing the trustee to disclaim such interest. *In re* WILSON - - - 186

DISCOVERY—Endowed Schools Act—Jurisdiction of Commissioners - - 269
See ENDOWED SCHOOLS ACT.

DISCRETION—Trustees—Sale of brickfield 263
See ROYALTY.

DISTRIBUTIONS, STATUTE OF (22 *&* 23 *Car.* 2, *c.* 10)—*Grandchildren and Great grand-children—Division per Stirpes.*] A fund was divisible under the *Statute of Distributions* among grandchildren and great-grandchildren, claiming by two lines of descent from their common ancestor:—*Held*, that the fund must be divided into moieties; and each moiety sub-divided between the respective descendants *per stirpes*, and not *per capita*. *In re* ROSS'S TRUSTS - - 286

DIVISION PER STIRPES - - - 286
See DISTRIBUTIONS, STATUTE OF.

DOCUMENTS—Covenant in separation deed 511
See SEPARATION DEED.

—— Production of - - - - 602
See PRODUCTION OF DOCUMENTS.

DONATIO MORTIS CAUSA—*Gift of Cheque with Delivery of Bank Pass-book—Cheque not presented in Donor's Lifetime.*] The delivery by a donor, in his last illness, of a cheque on his bankers was accompanied by a delivery of his bankers' pass-book. The cheque not having been presented until after the donor's death:—*Held*, that the gift was not a good *donatio mortis causâ*. *In re* BEAK'S ESTATE. BEAK *v.* BEAK - - - 489

ELECTION—School-board—Charges—Returning officer - - - - 336
See TAXATION OF COSTS.

ENDOWED SCHOOLS ACT, 1869 (32 *&* 33 *Vict. c.* 56)—*The Meyricke Fund—Jesus College, Oxford—The Endowed Schools Commissioners—Jurisdiction—Discovery—District—Charitable Trusts Act*, 1853 *and* 1855 (16 *&* 17 *Vict. c.* 137, *and* 18 *&* 19 *Vict. c.* 124).] The Endowed Schools Commissioners have jurisdiction to compel a college in an university to make discovery of matters relating to an endowment of which the college are trustees, for exhibitioners selected from a particular district, and whose exhibitions are tenable at the university.—*Wales* is a district within the *Endowed Schools Act*, 1869 (32 & 33 Vict. c. 56). *In re* "THE MEYRICKE FUND." 269

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—— Depositions under Companies Act, 1862, s. 115 - - - - 566
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—— Motion reserved till the hearing—Fresh evidence - - - - 401
See Motion reserved till the Hearing.

—— Special Examiner - - - 27
See Special Examiner.

—— Undue publication of banns—Knowledge of both parties - - - - 369
See Undue Publication of Banns.

—— Unstamped letter - - - 529
See Mutual Insurance Society.

—— Winding-up — Summons to examine witness - - - - 178, 179, n.
See Witness in Winding-up. 1, 2.

EVIDENCE OF DEATH — 33 & 34 *Vict. c.* 71, part iv., *s.* 24—14 & 15 *Vict. c.* 99, *s.* 14—*Bank of England—Fund in the joint Names of Three Persons—Death of One.*] Evidence which the Court of Chancery may now, in uncontested cases, consider sufficient to prove a death, is not necessarily binding and conclusive upon, or to be accepted as satisfactory by, the *Bank of England.* The Bank has a discretion to exercise for its own protection and the benefit of the public; and this Court will not compel it, when exercising that discretion *bonâ fide*, to depart from its own settled practice. Therefore, an injunction to restrain the Bank from requiring an examined copy of a burial certificate purporting to be duly signed was refused. Prosser *v.* Bank of England 611

EXAMINATION OF TRUSTEE—*Bankruptcy Act*, 1869, *ss.* 55, 58, 96 — *Bankruptcy Rules*, 1870, *Rules* 171, 243—251—*Jurisdiction.*] Under sects. 72 and 96 of the *Bankruptcy Act*, 1869, and rule 171 of the Bankruptcy Rules, 1870, the Court of Bankruptcy has power, on the application of a creditor, to order a trustee to submit himself for examination. *Ex parte* Crossley. *In re* Taylor - - - - - - - 409

EXECUTOR—Gift to, in that character - 131
See Gift to Executor in that Character.

—— Liability for breach of trust by testator 434
See Breach of Trust by Testator.

—— Mortgage by, to building society - 555
See Mortgage by Executor.

EXECUTION CREDITOR—*Bankruptcy Act*, 1869, *s.* 87—*Trustee—Trader.*] An execution creditor who has seized the goods of his debtor before the latter has committed an act of bankruptcy is entitled to the proceeds of them as against the trustee. Therefore, where goods of a non-trading debtor was seized on the 18th of February, and the debtor filed a petition for liquidation on the 22nd of February:—*Held*, that the execution creditor was entitled to the proceeds of the execution. The *Bankruptcy Act*, 1869, has no retrospective operation, and where it speaks of traders, it means such persons only as were traders at the time when it first came into operation. Therefore, where a person had ceased to trade in 1868, but in 1871 owed various debts contracted during the period he was in trade:—*Held*, that he was not a trader within the meaning of the *Bankruptcy Act*, 1869. *Ex parte* Bailey. *In re* Jecks - - - - - - - 314

EXCEPTIONS FOR SCANDAL—*Scandalous Matter not pertinent to the Relief.*] The bill alleged that under a certain contract the Plaintiff was entitled to shares in a company which had been placed under the control of the Defendant, who was to dispose of them as he should from his experience in such matters think fit. It then alleged that the Defendant was in fact in league with other persons, whom he called a syndicate, in order to deal with the shares and contrive operations on the *Stock Exchange* (popularly called rigging the market) for the purpose of bringing the shares up to a fictitious value in the market. The bill prayed a decree for specific performance of the contract, and that the Defendant might be restrained by injunction until the Plaintiff's claim should be satisfied, from parting with the shares in his possession:—*Held*, upon an exception for scandal, that the allegation of improperly dealing with the shares was scandalous matter, and not pertinent to the relief sought, and must be expunged from the bill. Rubery *v.* Grant - - - - 443

EXTRA WORKS—Building contract - 1
See Building Contract.

FAILURE OF PURPOSE OF LEGACY—*Will—Legacy—Gift Valid—Special Case—Practice.*] Testator, after giving a life annuity, from and after the death or marriage of his sister-in-law, in trust for his nephew, her son, bequeathed the residue of his mixed real and personal estate specifically in favour of his nieces, their husbands, and children. He then declared that "for making a further provision for the maintenance of" his above-mentioned nephew, it should be lawful for his trustees, during the life of his sister-in-law, upon her request in writing, to expend any sums not exceeding £6500 in the purchase of a commission for, or in obtaining the promotion of, his nephew in the army. After the testator's death the nephew, being in the army, exchanged from one regiment into another, and in so doing paid £600 for the exchange, and £550 for horses and outfit; after which, in May, 1868, his mother signed and sent a formal request to the trustees, desiring that the whole of the £6500, with interest from the day of the date of the request, should be raised out of the residuary estate, and paid to her son. From and after the 1st of November, 1871, purchase of commissions in the army was by royal warrant abolished:—*Held*, that the nephew was entitled to the full sum of £6500, with interest at 4 per cent. from the date of the request, subject to the payment of legacy duty. Since the filing of a special case affecting property to which certain infant Defendants were entitled, another child in the same interest had been born.—The Court, at the hearing, dispensed with the presence of the newly-born child. Palmer *v.* Flower - 250

FARMING STOCK—Bequest of life interest 432
See Gift of Consumable Articles.

FEAR OF CONVICTION—Voluntary deed 485
See Voluntary Deed.

FICTITIOUS NAME—Application for shares 566
See Application for Shares.

FORECLOSURE SUIT—Parties—Judgment creditors - - - - 210
See Judgment Creditor.

FORFEITURE CLAUSE — *Bankruptcy — Annulment.*] By a will a fund was given (subject to a prior life interest) to *R.* for life, but it was provided that if (amongst other things) by act or operation of law he should be personally deprived of the receipt and benefit of the bequest, then the life interest should cease, and the income should go to the persons entitled in remainder. At the time of the determination of the prior life interest, and for several years afterwards, *R.* was a bankrupt, and in consequence of such bankruptcy the fund was paid into Court under the *Trustee Relief Act.* Before any petition was presented for payment of the fund, or application of the income thereof for the benefit of the persons entitled in remainder, *R.* procured the annulment of this bankruptcy on the terms that the past dividends should be paid to the assignee :—*Held*, that *R.* had nevertheless forfeited his life interest. *White* v. *Ch tty* (Law Rep. 1 Eq. 372) and *Lloyd* v. *Lloyd* (Law Rep. 2 Eq. 722) distinguished. *In re* Parnham's Trusts - - - 413

2. —— *Tenant for Life—Alienation—Petition for Liquidation—Bankruptcy Act* 1869, *s.* 125—*Bankruptcy Rules*, 1870.] Under a settlement in a will, it was provided that if the tenant for life of the income of a sum of stock should at any time during his life "assign over, assure, mortgage, or in any manner incumber, or by any instrument in writing, parol agreement, or otherwise howsoever, part from" the income, the life estate should be forfeited :—*Held*, that the presentation by the tenant for life of a Petition for liquidation, under the arrangement clauses of the *Bankruptcy Act*, 1869, operated as a forfeiture of his life estate. *In re* Amherst's Trusts - 464

FRAUDS—Statute of - - - - 191
See Agreement by Letters.

FRAUDULENT PREFERENCE—Directors' fees
See Directors' Fees. [255

FRENCH CONTRACT—Suit in French Court—Staying proceedings - - 362
See Lis Alibi Pendens.

FRENCH CURATOR BONIS—*Lunatic in France.—Trustees Relief Act.*] An Englishman while resident in *France* was found a lunatic by the law of that country, and a *curator bonis* was appointed by the French Court. A fund in this country to which the lunatic became entitled was paid into Court, under the *Trustees Relief Act* :—*Held*, upon Petition by the *curator bonis* for payment of the fund to him as a matter of right, that the Court could exercise a discretion: and, it appearing that the lunatic was sufficiently provided for, an order was made for retaining the *corpus* of the fund in Court, and the payment of the dividends only to the *curator*. *In re* Garnier - 532

GENERAL LINE OF BUILDINGS — *Metropolis Local Management Acts Amendment Act*, 1862 (25 & 26 *Vict. c.* 102, *ss.* 75, 107)—*Summons against Builder—Person engaged in any Work—Occupier not served—Time for taking out Summons—Completion of Framework of Building.*] A summons under the *Metropolis Local Management Acts Amendment Act*, 1862, for building beyond the general line of buildings in a street, is only good against the builder if it is issued whilst the building complained of is in course of erection. After the completion of the work, the summons should be against the owner or occupier. The six months limited by sect. 107 for the commencement of any proceedings for penalties under the Act, begins to run from the time when the structure is discovered to be so far advanced as to shew the full extent of the projection complained of, and not from the completion of the building. Brutton *v.* Vestry of St. George's, Hanover Square - - - - - - 339

GENERAL ORDER, Feb. 1861—Rule 19 - 401
See Motion reserved till Hearing.

GENERAL ORDER, Nov. 1862—Rules 25, 26 623
See Interest in Winding-up.

GENERAL RULES IN BANKRUPTCY, 1870—Rules 16, 17, 26, 251, 253 - - 638
See Place of Business.

—— Rules 171, 243, 251 - - - 409
See Examination of Trustee.

—— Rule 252 - - - - 464
See Forfeiture Clause. 2.

GENERAL RULES IN BANKRUPTCY, July, 1871—Rule 28 - - - - 186
See Disclaimer by Trustee in Bankruptcy.

GIFT OF CHEQUE—*Donatio mortis causâ* 489
See Donatio Mortis Causâ.

GIFT OF CONSUMABLE ARTICLES — *Will — Construction—Gift for Life of Farm and Farming Stock—Articles quæ ipso usu consumuntur.*] A gift for life of a business and stock in trade confers only a life interest in such part of the stock in trade as consists of consumable articles. *Secus*, where the gift is of consumable articles, without any reference to trade or business. Cockayne *v.* Harrison - - - - - 432

GIFT TO EXECUTOR IN THAT CHARACTER—*Will—Legacy to Executor who does not act—Words "my friend P." and "as a remembrance."*] Testator appointed his "friend" *P.* his executor, and gave him a legacy "as a remembrance." *P.* did not act as executor :—*Held*, that he was entitled to the legacy without proving the will. Bubb *v.* Yelverton - - - - 131

GOODWILL—Sale of - - - - 322
See Sale of Goodwill.

GRANDCHILDREN and great grandchildren—Division *per stirpes* - - - 286
See Distributions, Statute of.

GUARANTEE—Continuing - - - 450
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—— Withdrawal of - - - - 450
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GUARDIAN—Testamentary - - - 36
See Testamentary Guardian.

HEIR-AT-LAW—Estate contracted to be purchased—Contract rescinded - 417
See Rescinded Contract.

—— Substituted service on administrator—Motion for decree - - - - 461
See Substituted Service. 2.

HUSBAND AND WIFE—Application for shares by married woman - - - 566
See Application for Shares.

—— Covenant to settle future property - 295
See Covenant to settle.

—— Partition suit—Payment of proceeds of sale
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—— Partition suit—Request for sale by wife 280
See Partition Suit. 3.

—— Separate estate—Pauper lunatic - 168
See Maintenance of Lunatic.

—— Separation deed - - - - 511
See Separation Deed.

—— Special case—Marriage of female party 462
See Special Case.

—— Undue publication of banns—Knowledge of both parties - - - - 369
See Undue Publication of Banns.

ILLEGITIMATE CHILDREN—Testamentary guardian - - - - - - 36
See Testamentary Guardian.

INCLOSURE COMMISSIONERS—Local management scheme - - - 574
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INCOME AND CAPITAL—Royalty - - 263
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INDEFEASIBLE TITLE—Mortgagee - 142
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INDEMNITY—Transferee of calls—Proof under creditors' deed - - - 66
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INFANT—Legacy—Devastavit—Charge on real estate - - - - 123
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—— Partition suit—Request for sale 173, 175, n.
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—— Plaintiff in suit—Adoption of suit - 497
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—— Transferee of shares—Liability of jobber 203
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INJUNCTION—Application to Parliament - 574
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—— Libellous publication—Solvency of benefit society - - - - 619
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—— *Lis alibi pendens*—Proceedings in *France*
See Lis Alibi Pendens. [362

—— Right to name of discoverer—"Only genuine article" - - - - 421
See Right to Name of Discoverer.

—— Threats of legal proceedings - - 355
See Threatening Legal Proceedings.

INJUNCTION IN BANKRUPTCY—*Bankruptcy Act*, 1869, *s.* 72—*Jurisdiction—Inspectorship Deed.*] Where an inspectorship deed has been duly executed under the provisions of the *Bankruptcy Act*, 1861, the Court has power to restrain a creditor under the deed from continuing an action against the debtor in *Ireland*.—The right to restrain such a creditor is a right against him personally, because he sues in respect of a claim enforceable under a deed. *Ex parte* Tait. *In re* Tait & Co. [311

INJURY TO REPUTATION—*Permanent Benefit Building Society and Deposit Bank—Publication containing alleged Libellous Paragraphs—Injunction refused.*] A motion on behalf of Plaintiffs, trustees of a permanent benefit building society, being also a bank for deposit, for an injunction to restrain the publication and sale by the Defendants of a book containing alleged libellous paragraphs in reference to the annual balance sheets and solvency of the society was refused.—*Dixon* v *Holden* (Law Rep. 7 Eq. 488) observed upon. Mulkern *v.* Ward - - - - 619

INSPECTORSHIP DEED—Injunction - 311
See Injunction in Bankruptcy.

INTEREST—Debts in winding-up - 623
See Interest in Winding-up.

—— Mortgage—Payment without notice - 176
See Mortgage of Reversion.

INTEREST IN WINDING-UP—*Company—Creditors—Principal and Surety—Winding-up Order—Payment by Surety—Companies Act*, 1862, *s.* 158—*Ord. of 11th November*, 1862, *rr.* 25, 26—*Proof for Indemnity—Surplus Assets.*] An order to wind up a company fixes the right of its creditors, and nullifies, as between them, all contracts for interest.—Therefore, a demand for interest accruing after the order, upon payments made by a surety for the company, will not be admitted to proof by him; but he may take a claim into Chambers for the estimated value of his right to indemnity at the time when the winding-up order was made.—*Semble*, the claim for interest should be made against the surplus assets only of the company, after all its debts (*quâ* principal moneys) are paid. *In re* International Contract Company. Hughes' Claim - - - 623

INVESTMENT—Lands Clauses Act—Costs [334,495
See Costs under Lands Clauses Act. 1, 2.

—— Settled Estates Act—Request to invest 183
See Settled Estates Act.

—— Settlement—Trust moneys - 232, 608
See Investment by Trustees. 1, 2.

INVESTMENT BY TRUSTEES—*Shares in an Unlimited Company—Costs.*] A testator gave all the residue of his estate and effects, whether real or personal, to four trustees upon trust to sell his freehold estate at *L.*, and such part of his personal estate, immediately after his decease, or so soon thereafter as the trustees might see fit to do so, and either by auction or private contract as to his trustees should seem proper. The personal estate comprised shares in an unlimited banking company, which was of high standing and repute at the testator's death. The trustees retained these shares for two years and a quarter, when the bank suspended payment, and the company was wound up. Three months after the testator's death the trustees also accepted new shares in the

INVESTMENT BY TRUSTEES—*continued.*

bank, which were allotted to the holders of old shares, and the entire loss to the estate amounted to £1910:—*Held*, upon a bill filed to administer the estate by the next friend of infants who were entitled to one-third of the property, that the trustees, although they had acted in perfect good faith and as they considered best for the interests of the *cestuis que trust*, were bound to have sold the bank shares within a reasonable time, which was one year from the testator's death; and were, therefore, liable to make good the loss sustained on both sets of shares:—*Held*, also, that one of the trustees, who did not attain twenty-one till seventeen months after the testator's death, was equally liable with his co-trustees.—So much of the costs of the administration suit as were caused by the default of the trustees were ordered to be paid by them. SCULTHORPE *v.* TIPPER - 232

2. —— *Settlement—Power of Investment—"Real or Personal" Security.*] Trustees of a marriage settlement were empowered, with consent of the husband and wife, to invest the funds on such security, "either real or personal," as they, with such consent, should think proper. At the date of the marriage a sum of £2500, part of the trust funds, was outstanding on the note of hand of the husband, having been advanced to him by the intended wife prior to the marriage. A separation having taken place, but the wife, nevertheless, desiring that the fund should remain in the husband's hands:—*Held*, that this investment might be continued until further order on the husband executing a bond to the trustees for the £2500. PICKARD *v.* ANDERSON - 608

JOBBER—Stock Exchange—Liability - 203
See CUSTOM OF STOCK EXCHANGE.

JOINT TENANT—Tenant in common—"All and every the child and children" - 28
See JOINT TENANCY OR TENANCY IN COMMON. 1.

—— Tenant in common—"Between" - 128
See JOINT TENANCY OR TENANCY IN COMMON. 2.

JOINT TENANCY OR TENANCY IN COMMON—*Will—Construction—Gift to "all and every the child and children."*] A gift in trust for "all and every the child and children" of *A.* and his, her, and their executors, administrators, and assigns, for his, her, and their own absolute use and benefit:—*Held*, to create a joint tenancy. MORGAN *v.* BRITTEN - - - - 28

2. —— *Will — Construction — "Between."*] Under a gift in a will to such of the nephews and nieces of *A.* and the children of *A's* deceased niece *B.* thereinafter named (then followed the name of the nephews and nieces and children of the deceased niece), as should be living at the time of the decease of the testatrix, to be divided between and among them *per stirpes* equally and not *per capita*, the children of *B.* taking between them only the equal share to which *B.* would have been entitled if named in that bequest instead of her children, and living at the time of the decease of the testatrix:—*Held*, that the children of *B.* took as tenants in common. ATTORNEY-GENERAL *v.* FLETCHER - - - - - 128

JUDGMENT CREDITOR—*Foreclosure Suit—Necessary Parties—Costs.*] In a foreclosure suit by mortgagees, judgment creditors, who had not issued execution, were made Defendants:—*Held*, that they were unnecessary parties, and having disclaimed all interest upon being served with copy of the bill, they were dismissed with costs. Other judgment creditors were made Defendants, who, after issuing execution, had assigned away all their interests before bill filed, and disclaimed by their answer:—*Held*, that they were entitled to their costs.—*Mildred* v. *Austin* (Law Rep. 8 Eq. 220) disapproved of. EARL OF CORK *v.* RUSSELL - - - - - 210

JURISDICTION—Account—Chancery - 1
See BUILDING CONTRACT.

—— Bankruptcy—Place of business of bankrupt - - - - - 638
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—— Commissioners under Endowed Schools Act - - - - - 269
See ENDOWED SCHOOLS ACT.

LAND REGISTRY ACT (25 & 26 *Vict. c.* 53), *s.* 17—*Indefeasible Title—Mortgagor with indefeasible Title—Purchase from Mortgagee—Form of Order.*] The order made *In re Richardson* (Law Rep. 12 Eq. 398) varied. *In re* RICHARDSON 142

LAPSE—Appointed share - - - 163
See APPOINTMENT BY RESIDUARY GIFT.

LAPSE OF TIME—Subscriber to memorandum—Resignation - - - 228
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LEASEHOLDS—Disclaimer by trustee in bankruptcy - - - - 186
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—— Investment in, of proceeds of freeholds 495
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LEGACY—Failure of purpose - - 250
See FAILURE OF PURPOSE OF LEGACY.

—— Infant — Charge on real estate in aid of personalty—Devastavit by executor 123
See DEVASTAVIT.

LEGALITY—Covenants in separation deed 511
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LEGATEE—Attestation of will by—Republication of codicil - - - 381
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—— Posting of—Notice of allotment - 148
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LIABILITY — Directors — Misrepresentation in prospectus - - - - 79
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—— Executors—Breach of trust by testator 434
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—— Jobber on Stock Exchange - - 203
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—— Subscriber of memorandum - - 228
See SUBSCRIBER TO MEMORANDUM.

—— Transferee of calls — Indemnity — Proof under creditors' deed - - 66
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—— Trustees—Insecure investments - 232
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—— Unregistered insurance company — Limitation by contract - - - 547
See UNREGISTERED LIFE INSURANCE COMPANY.

LIBEL—Injury to reputation - - 619
See INJURY TO REPUTATION.

LIBEL IN NEWSPAPER—*Printer and Publisher—Proprietors' Names—Bill of Discovery*—6 & 7 *Will.* 4. *c.* 76—32 & 33 *Vict. c.* 24—33 & 34 *Vict. c.* 99.] A demurrer to a bill alleging that certain newspapers contained articles or paragraphs, and other matter, libelling the Plaintiff; that the Defendant was the printer and publisher of the newspapers; and that the Plaintiff had instructed his solicitor to bring an action for damages against the proprietors of the newspapers, and seeking for the discovery of their names under the provisions of statutes 6 & 7 Will. 4, c. 76, s. 19, and 32 & 33 Vict c. 24, was overruled. DIXON *v.* ENOCH - - - - - - - 394

LIEN—Costs of arbitration—Lands Clauses Act [524
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—— Purchase-money—Railway company 261
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—— Purchase-money—Locke King's Act 493
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LIFE INSURANCE—Unregistered company 547
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LIMITATIONS, STATUTE OF—*Promissory Note—Subsequent Indorsement by Maker of his Name and Date—Lord Tenterden's Act—Acknowledgment of Debt.*] *L.*, in 1846, promised to pay, three months after date, to *B.* or to *C.*, his wife, the sum of £500. *B.* died in 1863, leaving *C.* surviving. There was an indorsement on the note in *L.'s* handwriting of his name and the year 1866. *C.* died in 1868:—*Held*, that it was not intended to make a new note, and that there was a sufficient acknowledgment to exclude the *Statute of Limitations*. BOURDIN *v.* GREENWOOD [281

LIQUIDATION BY ARRANGEMENT—Forfeiture of life estate - - - 464
See FORFEITURE CLAUSE. 2.

LIS ALIBI PENDENS—*Motion to stay Proceedings pending Litigation in France—French Contract.*] *A.*, an Englishman domiciled in *France*, entered into a contract in *France* with *B.*, a Frenchman, for carrying out jointly certain mercantile undertakings. In the course of the transactions large sums of money came into the hands of *C.* and *D.*, foreign merchants in business in *London*. *A.* filed a bill against *B.*, *C.*, and *D.*, alleging that, under the contract with *B.*, he was entitled to participate in the profits of the undertaking, and praying for an account from *C.* and *D.* of the money in their hands, and that they might be restrained from handing it over to *B.* The Defendants moved to stay all further proceedings in the suit pending

LIS ALIBI PENDENS—*continued.*

certain proceedings in the French Courts instituted by *A.* against *B.*, in which a construction would be put upon the French contract:—*Held*, that there being portions of the relief sought as to which the Defendants were bound to answer, the motion, which was in the nature of a demurrer, could not be sustained and must be refused with costs. WILSON *v.* FERRAND - 362

LOCKE KING'S ACT (17 & 18 *Vict. c.* 113)—*Amendment Act* (30 & 31 *Vict. c.* 69)—*Interest in Land—Share of Proceeds of Sale—Residuary Gift subject to Debts—Land devised upon Trusts for Conversion, whether within Locke King's Act.*] By a settlement, dated 1831, a freehold estate was settled in trust for the husband and wife for their lives, and after the decease of the survivor upon trust, after three months from the death of the survivor, to sell and invest the proceeds in trust for the children who should attain twenty-one; and it was declared that if the major part of the children should desire that the estate should not be sold, and should give three months' notice of such desire, the trusts for sale should determine, and the estate should be held upon the trusts following the trusts for sale; but if the children preferred that the estate should not be sold, the same should, until sale, be considered as personal estate.—The wife died in 1837. Three children attained twenty-one, and one died intestate, leaving her father her heir-at-law and sole next of kin. The father by his will, gave the third part of the estate to which he so became entitled to trustees for sale, to stand possessed of the proceeds for the benefit of *A. Lewis* absolutely; and the testator devised and bequeathed the residue of his estate, whatsoever and wheresoever, to his trustees, upon trust, after payment thereout of all his debts and subject thereto, for *J. Lewis* absolutely.—After the date of his will the testator mortgaged his third part of the settled estate, and died in 1870. The settled estate was afterwards sold under the trust in the settlement:—*Held*, that the interest given by the testator in the one-third of the settled estate was not an "interest in land" within the meaning of *Locke King's Act*, and consequently that the mortgage debt must be paid out of the residuary estate:—*Held*, also, that if it had been an interest in land within the Act, the residuary gift of real and personal estate, subject to payment of debts, would not have been a sufficient expression of a "contrary intention" to have exonerated the mortgaged estate.—*Semble*, that land devised upon trusts for conversion, and taken in its converted state, is not an "interest in land" within *Locke King's Act*. LEWIS *v.* LEWIS - 218

2. —— 30 & 31 *Vict. c.* 69—*Mortgage—Administration—Vendor's Lien.*] A lien for unpaid purchase-money is not a charge by way of mortgage, under statute 30 & 31 Vict. c. 69, where the purchaser dies intestate. HARDING *v.* HARDING [493

LUNACY—French *curator bonis*—Trustee Relief Act - - - - - 532
See FRENCH CURATOR BONIS.

—— Maintenance—Pauper lunatic in *Australia*—Separate estate - - - 168
See MAINTENANCE OF LUNATIC.

MAINTENANCE OF LUNATIC—*Pauper Lunatic in Colony—Maintenance—Wife's Separate Estate—Colonial Statute—Master in Lunacy—Accrued and Future Dividends.*] The accrued dividends on a fund settled to the separate use of a married woman, who had been for many years an inmate of a pauper lunatic asylum in the colony of *Victoria, Australia*, were ordered to be paid to the Colonial Master in Lunacy towards the payment of expenses incurred for past maintenance; and the future dividends on the same fund were ordered to be paid to the same Master in Lunacy, he being, on the construction of the Colonial Statute, the committee of the lunatic's estate. *In re* Baker's Trusts - - - - 168

MANOR—Waste—Sale to Board of Works—Power to sell or let - - - - 574
See Metropolitan Commons Act.

MARRIAGE—Undue publication of banns 369
See Undue Publication of Banns.

MARSHALLING—*Principal and Surety—Marshalling Securities.*] *A.* having effected policies upon his own life with an assurance office, mortgaged them to the office as a security for successive loans. In one of these mortgages *B.* became surety for repayment of the amount borrowed. *A.* subsequently became bankrupt, and *B.* was compelled as surety to pay part of the debt.—Upon *A.'s* death:—*Held*, as against *A.'s* assignee in bankruptcy, that *B.* was entitled to marshal the securities so as to obtain repayment out of the balance of the several policy moneys of the amount which he had been compelled as surety to pay:—*Held*, also, that a payment to *B.* by *A.'s* wife, out of the income of her separate estate, to reimburse him for the loss he had sustained, was not a payment on account of or as agent of *A.*, so as to set free the policies *pro tanto* from *B's* claim. Heyman *v.* Dubois - - - - 158

MEMORANDUM—Subscriber of - - 228
See Subscriber of Memorandum.

METROPOLITAN BOARD OF WORKS—Local Management scheme—Power to sell or let common land - - - 574
See Metropolitan Commons Act.

METROPOLITAN COMMONS ACT, 1866—(29 & 30 *Vict. c.* 122)—*Vendor and Purchaser—Metropolitan Board of Works—Inclosure Commissioners—Local Management Scheme—Powers of Board to sell or lease Part of a Metropolitan Common—Application to Parliament—Injunction.*] After the passing of the *Metropolitan Commons Act*, 1866, the Plaintiff, a part owner, and the other co-owners, of a manor, the waste of which became, under the above statute, a metropolitan common with the Board of Works as its local authority, sold and conveyed the manor (with the knowledge of the Board), for a sum of £10,200, to two trustees, who afterwards sold and conveyed the same to the Board of Works. By the former conveyance, the Plaintiff (being the owner of house property near the common) stipulated that if, within five years from the date of the deed, the common should not be inclosed and dedicated to the public, having no part of it sold or let on building-leases, he (the Plaintiff) should re-purchase his share of the Manor on giving the same price for it as he was then receiving. The Board of Works, with notice

METROPOLITAN COMMONS ACT, 1866—*contd.*
of this stipulation, memorialised the Inclosure Commissioners to prepare and certify a scheme of local management; and the Commissioners (on the suggestion of the Board) published a scheme, whereby it was proposed to give the board power to sell or let on building leases a small outlying portion of the common, for the purpose of recouping to the board their expenses of and attending the inclosure. Upon bill to restrain the board from promoting the scheme, or any scheme inconsistent with the stipulation:—*Held*, that the Board of Works were bound by the stipulation in the conveyance by the Plaintiff:—*Held*, further, that the Plaintiff's right, under the stipulation, to sue in equity was not affected by the circumstance that the scheme, in order to become operative, must be submitted to Parliament; and injunction granted as prayed. Telford *v.* Metropolitan Board of Works - - - 574

MINERALS—Reservation of - 408, 634
See Confirmation of Sales Act. 1, 2.

MISDESCRIPTION—Name of applicant for shares
See Application for Shares. [566

MISREPRESENTATION—Prospectus of company [79
See Misrepresentation in Prospectus.

MISREPRESENTATION IN PROSPECTUS—*Company—Concealment of Material Fact—Liability of Directors—Rights of Allottee of Shares—Rights of Transferee—Delay.*] Directors of a company issuing a prospectus are bound to disclose every material fact; and if they do not they will be held liable to indemnify any person who takes shares from the company on the faith of the prospectus against any loss which may be occasioned to him by reason of such concealment, even although they may have believed that the concealment will be beneficial to the persons induced to take shares.—A fact which, if disclosed, would have so discredited the company as to prevent its formation, is a material fact within the meaning of the foregoing proposition.—The estate of a deceased director is liable in equity in respect of such indemnity to the same extent as the director would have been if living.—A transferee of shares has no greater right to be indemnified by the directors in respect of their misconduct in issuing a prospectus than the original allottee would have had; and if the allottee would have been debarred of his remedy against the directors by laches, condonation, or otherwise, the transferee is also debarred of remedy.—Any person seeking relief against directors of a company in respect of misconduct in issuing a prospectus is bound to come promptly for relief.—In July, 1865, the directors of a company formed to take over the business of a firm which they knew to be insolvent, issued a prospectus in which the fact of such insolvency was withheld from the public. If the fact had been disclosed the company would not have been formed. The directors withheld the fact, honestly believing that the speculation on which they were about to embark would be successful.—In October and December, 1865, the Plaintiff, on the faith of the prospectus, bought in the market shares which had originally been allotted to a partner in the insolvent firm.—In May, 1866, the company stopped

MISREPRESENTATION IN PROSPECTUS—*cont.*
payment, and was afterwards wound up, and the Plaintiff after considerable litigation was settled on the list of contributories, and was compelled to pay large sums in respect of calls.—In March, 1868, the Plaintiff filed the bill in this suit, seeking to be indemnified in respect of his losses by the surviving directors, and the estate of a deceased director:—*Held*, that if he had been an original allottee and had come in due time, he would have been entitled to such indemnity; but that he was debarred of his remedy on the ground, first, that he was in no better position than the allottee from whom he bought, and, secondly, that he had come too late for relief. Peek *v.* Gurney - 79

MISTAKE IN CONVEYANCE—*Vendor and Purchaser—Suit to rectify Conveyance—Mistake—Option to set aside Transaction.*] The conveyance made in 1866, upon a sale of land by *S.* to *B.*, contained a reservation to *S.* of minerals. Four years subsequently *B.* filed a bill against *S.*, alleging that the reservation was inserted in the conveyance under a mistake common to both parties, and recently discovered by him, and praying for the rectification of the conveyance by the omission of it.—*S.* put in an answer denying the mistake and claiming the benefit of the reservation; and afterwards died before he could be cross-examined:—*Held*, that although, in the opinion of the Court, a mistake common to both parties had been made, of which *S.* sought to take an improper advantage, yet a simple decree for rectification could not be made after the lapse of time and against the oath of one of the parties; but that the Defendants, the representatives of *S.*, were entitled to the option of having the conveyance rectified, or the whole transaction set aside; and in the event of the Plaintiff not choosing to accept the latter alternative, the bill must be dismissed without costs. Bloomer *v.* Spittle 427

MORTGAGE—Agreement for—Specific performance - - - - - 76
See Agreement for Mortgage.

—— Copyholds—Vesting order—Trustee Act 26
See Trustee Acts. 1.

—— Executor—Building society—Power of sale
See Mortgage by Executor. [555

—— Mortgagee in possession—Sale with reservation of minerals - - - 634
See Confirmation of Sales Act. 2.

—— Policy of insurance—Surety—Marshalling
See Marshalling. [158

—— Policy of insurance—Tacking - 327
See Tacking by Mortgagee.

—— Reversionary interest - - - 176
See Mortgage of Reversion.

—— Tacking—After death of mortgagor - 327
See Tacking by Mortgagee.

—— Vendor's lien—Locke King's Act - 493
See Locke King's Act. 2.

MORTGAGE BY EXECUTOR—*Building Society—Sale under Power.*] An executor effected a mortgage of leasehold property, for executorship purposes, with a power of sale, to a building society, to secure the repayment of the money advanced, as well as all fines, premiums, and interest on certain advanced shares in the society, taken by

MORTGAGE BY EXECUTOR—*continued.*
the executor for the purpose of obtaining the loan:—*Held*, upon bill filed by the society against a purchaser under the power of sale, for specific performance, that the executor might legally effect a mortgage with power of sale and with the incidents of a building society mortgage on advanced shares. Cruikshank *v.* Duffin - - 555

MORTGAGE OF REVERSION—*Bill by Mortgagee for Administration of Testator's Estate—Payment by Surety of Principal and Interest due, and Costs—Six Months' Interest disallowed—Costs.*] *W. S.* in 1855, mortgaged a reversionary interest to which he was entitled under his father's will, and died in March, 1869, intestate, and there was no legal personal representative.—The Plaintiff, the mortgagee, having filed a bill for the administration of the father's estate, was, on behalf of a surety of the mortgagor, paid the principal and interest due on the mortgage security and a sum for costs of suit.—On motion to dismiss the bill:—*Held*, that the Plaintiff was not entitled to six months' interest in lieu of notice, but that he was entitled to the costs of the motion, as he had been paid off in a summary way. Letts *v.* Hutchins - 176

MOTION—Reserved till the hearing—Fresh evidence - - - - - 401
See Motion reserved till the Hearing.

—— Reserved till the hearing—Costs - 53
See Costs in the Cause.

MOTION RESERVED TILL THE HEARING—*Practice*—15 & 16 *Vict. c.* 86, *s.* 40—*Ord. of Feb. 5th*, 1861, *r.* xix.—*Affidavit—Order—Cross-examination—Costs.*] Where a motion is ordered to stand on certain terms till the hearing of the cause, no new evidence can be filed by the parties on the motion, which must be dealt with at the hearing in the manner in which it was originally brought on; and if the motion stands over in consequence of an affidavit of the Defendant, the motion is not "a matter depending in" or "a proceeding before" the Court, which entitles the Plaintiff to cross-examine the Defendant on his affidavit; even although the Plaintiff may have given notice that he is going to use it at the hearing of the cause.—Where the Court orders a motion to stand till the hearing of the cause, it simply reserves to itself the power of dealing with the costs of it differently from the costs in the cause. Singer *v.* Audsley - - 401

MUTUAL INSURANCE SOCIETY—*Policy—Stamp.*] *B. & Co.*, by letter, authorized the managers of a mutual marine insurance association to insure a ship with the association, and undertook to abide by the rules and regulations thereof. By the rules, each insurer became liable to contribute to the losses of any other insurer in certain proportions. In pursuance of the authority given by *B. & Co.*, a duly stamped policy was issued to them, which, however, contained no reference to the rules:—*Held*, that the letter, although not stamped, was admissible in evidence, and that *B. & Co.* were contributories.—*Smith's Case* (Law Rep. 4 Ch. 611) distinguished. *In re* Albert Average Association. Blyth & Co.'s Case - - - - - - 529

NAME—Discoverer of secret unpatented article [421
See Right to Name of Discoverer.

NAVIGATION SHARES—Sale to railway company—Conversion into personal estate
See Conversion. 3. [470

NEW BUSINESS—Right to solicit old customers
See Sale of Goodwill. [322

NEWSPAPER—Libel in - - - 394
See Libel in Newspaper.

NEXT OF KIN—Grandchildren and great-grandchildren - - - - 286
See Distributions, Statute of.

NOTICE—Motion for decree—Substituted service
See Substituted Service. 2. [461

—— Option of purchaser - - - 213
See Option of Purchase.

—— Policy of insurance—Bankruptcy - 188
See Order and Disposition.

ONEROUS PROPERTY—Bankruptcy—Disclaimer by trustee - - - 186
See Disclaimer by Trustee in Bankruptcy.

"ONLY GENUINE ARTICLE" - - 421
See Right to Name of Discoverer.

OPTION—To set aside transaction—Mistake 427
See Mistake in Conveyance.

OPTION OF PURCHASE—*When exerciseable.*] An agreement (sanctioned by Act of Parliament) was entered into between two water companies, by which it was agreed that company *A.* should take over the works, provide for a mortgage debt, and pay interest upon the shares of company *B.* This agreement was sanctioned by Act of Parliament, and the transaction was carried into effect by an indenture of January, 1857, which provided that if company *A.* (or their intended assignees, the Corporation or Local Board of Health), being desirous of becoming the absolute and unrestricted owners of the works of company *B.*, subject only to the mortgage debt, should, "on or before any 25th of December, after having given to company *B.* six months' previous notice of their desire to avail themselves of the option thereby given, pay unto company *B.*" £46,246, the amount of their share capital, the party so paying should become absolutely entitled to the works.—In June, 1870, the corporation, who had acquired the interest of company *A.*, gave notice to company *B.* of their intention to pay the £46,246, on the 25th of December following, but they were unable, from want of funds, to carry out the purchase. In June, 1871, they again gave notice that they would pay the money on the 25th of December, 1871:—*Held*, that the corporation, by giving the first notice and failing to act upon it, had not lost the right given to them by the deed of January, 1857, of purchasing, after six months' notice, on or before any 25th day of December. Ward *v.* Wolverhampton Waterworks Company - - - 243

ORDER AND DISPOSITION—*Bankruptcy—Notice—Policy of Insurance.*] Previous to his marriage *C.* insured his life in two offices for two sums of £500 each, and by his marriage settlement covenanted to insure his life for not less than £2000.

ORDER AND DISPOSITION—*continued.*

On the 29th of October *C.* handed over one of the policies to the solicitor for the trustees of the settlement, and on the 9th of December signed a memorandum stating that he handed over the two policies to the trustee in pursuance of the covenant contained in the settlement. *C.* was adjudicated bankrupt on the 13th of December. The other policy was handed over to the solicitor for the trustees on the 10th of January in the following year. Notice of the claim of the trustees to the policies was given to the offices after the bankruptcy, but before any notice had been given by the assignee:—*Held*, that the policies were in the order and disposition of the bankrupt at the commencement of the bankruptcy, and belonged to his assignee. *Ex parte* Caldwell. *In re* Currie [188

—— *Scotland*—Pledge of chattels - - 597
See Pledge of Chattels in Scotland.

OWNER AND OCCUPIER—Summons against—Metropolitan Management Act - 339
See General Line of Buildings.

PARLIAMENT—Application to—Local management scheme - - - 574
See Metropolitan Commons Act.

PARTIES—Foreclosure suit—Judgment creditors
See Judgment Creditor. [210

—— Petition under Confirmation of Sales Act—*Cestuis que trust* - - - 408
See Confirmation of Sales Act. 1.

—— Special case—New-born infant - 250
See Failure of Purpose of Legacy.

—— Special case—Marriage of female party 462
See Special Case.

PARTITION SUIT—*Sale*—31 & 32 *Vict. c.* 40, *ss.* 3, 4—*Infant Plaintiffs' "Request" for a Sale.*] Three infant Plaintiffs, who were with the infant Defendant tenants in common of lands under a will, filed a bill for partition, and on motion for decree, on the cause coming on to be heard as a short cause, the Plaintiffs made, under the provisions of the statute 31 & 32 Vict. c. 40, ss. 3, 4, a "request" for a sale of the lands.—On the authority of the order made in the cause of *Young* v. *Young* (Law Rep. 13 Eq. 175, n.) the costs of all parties were declared to be a charge upon their shares in the lands; and a sale was ordered. France *v.* France - - 173

2. —— *Infants—Request for Sale.*] Form of order when a sale in a partition suit is ordered upon the request of parties who are infants. Young *v.* Young - - - - 175, n.

3. —— *Plaintiff, Disability of—Decree for Sale*—31 & 32 *Vict. c.* 40, *s.* 3.] The Court will, under the *Partition Act*, 1868, make a decree for sale, instead of partition, at the request of a *feme coverte* Plaintiff. Higgs *v.* Dorkis - - 280

4. —— *Sale—Prayer for Partition*—31 & 32 *Vict. c.* 40, *s.* 3.] A bill for a sale of property under the above Act ought to pray for a partition also. —*Teall* v. *Watts* (Law Rep. 11 Eq. 213) followed. —*Aston* v. *Meredith* (Law Rep. 11 Eq. 601) not followed. Holland *v.* Holland - - 406

5. —— *Practice—Payment out of Proceeds of Sale*—31 & 32 *Vict. c.* 40, *s.* 3.] The Court will not

PARTITION SUIT—*continued.*
make an order for payment out to trustees of money produced by a sale under the *Partition Act*, 1868, where it had been paid into Court, and some of the persons interested were married women, and resident in *Australia*. Aston *v.* Meredith - - - - - - 492

PARTNERS—Substituted service on one partner for the others - - - - 77
See Substituted Service. 1.

PAST MEMBERS—Costs of settling B list - 388
See Costs in Winding-up.

PATENT—Assertion of invalidity—Threats of legal proceedings - - - 355
See Threatening Legal Proceedings.

PAUPER LUNATIC—*Australia*—Maintenance—Separate estate - - - 168
See Maintenance of Lunatic.

PAYMENT OUT OF COURT—*Practice—Lands Clauses Act, s.* 78—*Trustees for sale—Persons absolutely entitled.*] *Semble:* Trustees for sale whose *cestuis que trust* are under disability, are not persons absolutely entitled within the meaning of sect. 78 of the *Lands Clauses Act*. *In re* Reaston's Estate - - - - 564

PERSON OF UNSOUND MIND—Voluntary deed
See Voluntary Deed. [485

PERSONAL SECURITY—Power of investment—Money advanced to husband - 608
See Investment by Trustees. 2.

PETITION—Confirmation of Sales Act—Parties [408
See Confirmation of Sales Act. 1.

PETITIONING CREDITOR—*Bankruptcy Act*, 1869, *s.* 6—*Petitioning Creditor's Debt—"Liquidated Sum due at Law or in Equity."*] The petitioning creditor's debt must be a debt on which an action can be brought, and the word "due" in sect. 6 means "presently payable."—Therefore, where *S. & Co.* supplied goods to *P.* on a two months' credit to the amount of £117, of which amount, at the date of the presentation of the petition, only £49 odd was actually payable by *P.* to *S. & Co.*:—*Held*, that the debt was not sufficient to support the petition for adjudication. *Ex parte* Sturt & Co. *In re* Pearcy - 309

PLACE OF BUSINESS—*Bankruptcy Act*, 1869, *s.* 6, *sub-s.* 4, *ss.* 59, 80, *sub-s.* 6, *ss.* 125, 126; *Bankruptcy Rules*, 1870, *rr.* 16, 17, 26, 252, 253—*Petition for Liquidation—Adjudication—Jurisdiction.*] *C. & Co.* had their chief business offices at *Sheffield*, and were tenants of three rooms in *London*, in which an agent carried on business on behalf of the firm.—On *C. & Co.* becoming bankrupt:—*Held*, that the Bankruptcy Court at *Sheffield*, and not the Bankruptcy Court in *London*, had jurisdiction in the matter. *Ex parte* Charles. *In re* Charles - - 638

PLEADING—Bill of discovery—Demurrer 394
See Libel in Newspaper.

—— Partition suit—Prayer—Sale - - 406
See Partition Suit. 4.

PLEDGE OF CHATTELS IN SCOTLAND—*Registration of Bills of Sale Act* (17 & 18 *Vict. c.* 36)—*Deposit of Minute of Lease of Lands and Pledge of Chattels in Scotland—English Liquidation—Bankruptcy Act*, 1869, 32 & 33 *Vict. c.* 71.] An English debtor handed to the Plaintiff, an English creditor, a "minute" of a lease of a house and land in *Scotland* of which he was lessee, and a memorandum whereby he agreed to pledge the lease and certain chattels in the house by way of security for the debt. The minute provided for payment to the lessee for permanent improvements on the determination of the lease. The lease was determined, and a sum became payable for improvements. The debtor afterwards presented a petition for liquidation under the *Bankruptcy Act*, 1869, and trustees were appointed. By the law of *Scotland* the memorandum created no security:—*Held*, that the *Bills of Sale Act* did not apply to property in *Scotland*, and that the Plaintiff had, as against the debtor's trustees, a good charge on the chattels and the money receivable for improvements. Coote *v.* Jecks 597

POLICY OF INSURANCE—Bankruptcy—Order and disposition - - - 188
See Order and Disposition.

—— Mortgage—Tacking - - - 327
See Tacking by Mortgagee.

—— Reference to rules - - - 529
See Mutual Insurance Society.

—— Surety—Marshalling - - - 15
See Marshalling.

POSTING LETTER—Notice of allotment - 148
See Acceptance of Shares. 2.

POWER—Appointment by residuary gift 163
See Appointment by Residuary Gift.

—— Distinguished from property - - 144
See Power to take and apply.

—— Sale in mortgage—Reservation of minerals - - - - - 634
See Confirmation of Sales Act. 2.

—— Sale—Mortgage by executor to building society - - - - 555
See Mortgage by Executor.

—— Sale in a settlement—Conversion - 23
See Conversion. 1.

—— "To take and apply" - - - 144
See Power to take and apply.

POWER TO TAKE AND APPLY—*Will—Construction—"Property" or "Power."*] A testatrix having a power under a marriage settlement to appoint certain shares of real estate made an appointment to her husband "in trust to stand possessed thereof, and to enjoy the rents, profits, and income arising and to arise therefrom for his own absolute use and benefit, for and during the term of his natural life, with power to take and apply the whole or any part of the capital arising therefrom to and for his own benefit, and from and after the decease of my said husband," over:—*Held*, that the husband took a life interest with a power of appointment, and that, on his death, without having exercised the power, the gift over took effect. Pennock *v.* Pennock - - - - - - - 144

PRACTICE—Certificate of Chief Clerk - 202
See Revivor and Supplement. 2.

—— Costs of unsuccessful motion - - 144
See Costs in the Cause.

PRACTICE—*continued.*
—— Costs of reserved motion - - 401
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—— Death of trustee—Representative - 139
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—— Exceptions for scandal - - 443
See Exceptions for Scandal.
—— Lands Clauses Act—Payment to trustees - - - - - 564
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—— Motion reserved till the hearing—Fresh evidence - - - - 401
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—— Partition suit.
See Cases collected under Partition Suit.
—— Production of documents—Affidavit 602
See Production of Documents.
—— Revivor—Death of sole Plaintiff - 138
See Revivor and Supplement. 1.
—— Sale before Chief Clerk - - 349
See Sale before Chief Clerk.
—— Settled Estates Act—Investment of money in Court - - - - - 183
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—— Special case—Birth of infant - 250
See Failure of Purpose of Legacy.
—— Special case—Marriage of female party 462
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—— Substituted service—Appearance - 77
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—— Substituted service—Motion for decree 461
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—— Supplemental order—Certificate filed in defective suit - - - 202
See Revivor and Supplement. 2.
—— Winding-up—Special Examiner - 27
See Special Examiner.

PROCEEDS OF SALE—Share of—Locke King's Act - - - - - 218
See Locke King's Act. 1.

PRODUCTION OF DOCUMENTS—*Practice—Affidavit—Sufficiency.*] Three executors, two of whom, together with other persons not parties to the suit, were members of a firm to which their testator had belonged, had for many years allowed part of the testator's estate to remain in the firm. On a bill against the executors for administration and to make the Defendants account for profits made by the use of the testator's property:—*Held*, that the executors were bound to include the books of the firm in the schedule to their affidavit of documents. Vyse *v.* Foster [602

PROMISSORY NOTE—Statute of Limitations—Acknowledgment - - - 281
See Limitations, Statute of.

PROPRIETORS OF NEWSPAPER - - 394
See Libel in Newspaper.

PROSPECTUS—Misrepresentation in - 79
See Misrepresentation in Prospectus.

PUBLICATION—Banns - - - 369
See Undue Publication of Banns.

PURCHASE—Option of—When exerciseable 243
See Option of Purchase.

RAILWAY COMPANY—Accommodation works 45
See Specific Performance of Works on Plaintiff's Land.
—— Costs under Lands Clauses Act 334, 495
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See Vendor's Lien against Railway Company. 1, 2.

REAL AND PERSONAL ESTATE—Charge of legacy—Devastavit - - - 123
See Devastavit.
—— Conversion - - - 23, 133, 470
See Conversion. 1, 2, 3.

RECTIFICATION—Deed - - - 427
See Mistake in Conveyance.

REINVESTMENT OF PURCHASE-MONEY—Leaseholds—Costs - - - 495
See Costs under Lands Clauses Act. 2.

REMOTENESS—*Devise of Estates for Life—Term of 500 Years—Devise of Estates in Tail—Trusts to raise a Sum of Money—Demurrer.*] A testator in 1803 devised estates to his eldest son *R.* for life, with remainders to his grandson *R.* for life; to trustees to preserve contingent estates; to other trustees for 500 years upon certain trusts; to the first and other sons of his grandson *R.* in tail male; and in default of issue, to the second and other sons of his son *R.* in tail male; and in default of issue to his son *N.* for life; to the same trustees to preserve contingent estates; to the first and other sons of *N.* in tail male; with remainders over in favour of other sons for life and their issue in tail.—The limitation of the term was for the purpose of enabling the trustees, by mortgage or otherwise, in case any one or more of the testator's younger sons, or their issue, should become seised in possession by virtue of the limitations of the estates devised to his son *R.* for life, with remainders over, to raise a sum of £5000 for the benefit of such of the testator's sons (except the son in possession of the estates) as should be then living, or their issue.—The testator's eldest son had no son other than the testator's grandson *R.*, who died on the 24th of February, 1870, without issue, and the estates devolved upon the infant Defendant, a grandson of the testator's son *N.*—The Plaintiffs were a younger son of *N.*, and the son of the testator's younger son *H.*:—*Held*, on demurrer to a bill praying a declaration that according to the true construction of the will, and in the events which had happened, the sum of £5000 was validly charged upon the estates, and was now raiseable with interest at 4 per cent. from the 24th of February, 1870, that the charge failed for remoteness.—*Case* v. *Drosier* (2 Keen, 764; 5 My. & Cr. 246), followed. Sykes *v.* Sykes - - - - - - 56

REPRESENTATIVE—Death of accounting trustee [139
See Appointment of Representative.

REPUBLICATION OF WILL—1 *Vict. c.* 26, *ss.* 15, 34.] Testatrix by her will gave a share of her residuary real and personal estate to *B.*, and one of the attesting witnesses to the will was *B.'s*

REPUBLICATION OF WILL—*continued.*

wife. By a codicil, which was attested by other witnesses, testatrix, after a direction to her executors to allow an extended time for payment of a debt due to her from one of her legatees, confirmed her will in other respects:—*Held*, that the duly attested codicil had the effect of republishing and incorporating the will so as to render the gift to *B.* valid, notwithstanding attestation of the will by *B.*'s wife. Anderson *v.* Anderson 381

RESCINDED CONTRACT—*Sale of Real Estate—Power to rescind—Death of Purchaser before Completion—Rights of Heir.*] An intestate was, at the time of his death, under a contract to purchase realty, which the vendor might have specifically enforced, but which he afterwards rescinded under a power thereby reserved to him:—*Held*, that the heir-at-law of the intestate was entitled to receive the purchase-money out of the intestate's personal estate. Hudson *v.* Cook - - 417

RESERVATION OF MINERALS - 408, 634
See Confirmation of Sales Act. 1, 2.

RESIDUARY GIFT—Appointment—Lapsed share [163
See Appointment by Residuary Gift.

RESIGNATION—Director - - - 228
See Subscriber of Memorandum.

RESULTING TRUST—Conversion by will - 133
See Conversion. 2.

RETURNING OFFICER—School board—Charge
See Taxation of Costs. [336

REVERSION—Covenant to settle - - 295
See Covenant to settle.

—— Payment without notice—Six months' interest - - - - 176
See Mortgage of Reversion.

REVIVOR AND SUPPLEMENT—*Practice—Death of Sole Plaintiff—Defendant Legal Personal Representative of deceased Plaintiff.*] Where a sole Plaintiff dies before decree, and a Defendant becomes his legal personal representative, the common order to revive cannot be made. Bates *v.* Bates - - - - - - 138

2 —— *Practice—Certificate filed while Suit defective—Taking Certificate off File—Supplemental Order*—15 & 16 *Vict. c.* 86, *s.* 52.] Where the Chief Clerk's certificate in a suit was filed after the birth of an infant who was a necessary party to the suit, but before the infant had been made a party, the Court, upon the application of all parties, and in order to avoid the expense of a supplemental suit, directed the certificate to be taken off the file. Cuthbert *v.* Harmby - 202

RIGHT TO NAME OF DISCOVERER—*Injunction—Secret Preparation—Use of Name of Discoverer—Advertisement as "only" genuine.*] Any person who has, without the use of unfair means, become acquainted with the mode of compounding a secret unpatented preparation may, after the death of the original discoverer, make and sell the compound, describing it by the name of the discoverer, provided he does not lead the public to suppose that his preparation is the manufacture of the successors in business of the original discoverer; but he must not assert that his is the

RIGHT TO NAME OF DISCOVERER—*continued.*

only genuine article, or suggest that the article manufactured by the successors of the original discoverer is spurious. James *v.* James - 421

ROYALTY—*Tenant for Life and Remainderman—Open Brick-field—Devise for Sale at Discretion of Trustees.*] A testator, having purchased a piece of land, opened it as a brick-field, and it was open at his death. By his will he devised it to trustees upon trust to sell "when, in their discretion, it may seem advisable;" and he directed that the rents "and profits" should, until sale, be considered as part of his personal estate, and be applicable and applied in such manner as the dividends or interest to arise from the investments of the sale moneys. He then gave the income of the investments to a tenant for life, with remainder, as to the capital, over.—Royalties became payable after the testator's death. The trustees did not sell for ten years, but allowed the brickfield to be worked out, being of opinion that by holding the land for the present, they might sell it at a higher price afterwards for building purposes:—*Held*, that the tenant for life was entitled to the royalties absolutely, and not merely to the income which they would have produced if invested. Miller *v.* Miller - 263

SALE—By Court—Before Chief Clerk - 349
See Sale before Chief Clerk.

—— By Court—Conditions of sale - - 196
See Conditions of Sale.

—— Goodwill of business - - - 322
See Sale of Goodwill.

—— Partition suit 173, 175, n., 280, 406, 492
See Partition Suit. 1—5.

—— Power of conversion - - - 23
See Conversion. 1.

—— Real estate—Contract rescinded—Purchase-money—Heir-at-law - - 417
See Rescinded Contract.

SALE BEFORE CHIEF CLERK—*Jurisdiction of Court—Chief Clerk—Master in Chancery Abolition Act* (15 & 16 *Vict. c.* 80)—*Sale by Auction in Chambers before the Chief Clerk.*] The Court has power, since the passing of the *Master in Chancery Abolition Act*, to have a sale of real estate, directed to be sold under the Court, made by auction in Chambers before the Chief Clerk; and where all parties interested are *sui juris*, and before the Court, they may, if they think it expedient, have a sale effected in this manner. Where, however, there are parties not before the Court, or not *sui juris*, the duty is thrown upon the Court of determining what is the most beneficial mode of conducting the sale, and the fact of the power having fallen into disuse tending to shew that its exercise was in general inexpedient, the Court directed a sale by an auctioneer. Pemberton *v.* Barnes - - - - 349

SALE OF GOODWILL—*Vendor setting up new Business—Right to solicit old Customers.*] The vendor of a business and the goodwill thereof may, in the absence of express stipulation to the contrary, set up a business of the same kind either in the same neighbourhood or elsewhere, and may publicly advertise the fact of his having

SALE OF GOODWILL—*continued.*
done so; but he must not solicit the customers of the old business to cease dealing with the purchaser, or to give their custom to himself. Labouchere *v.* Dawson - - - 322

SCANDAL—Exceptions for—Matter not pertinent to the relief - - - - 443
See Exceptions for Scandal.

SCHOOL BOARD—Election of—Charges—Returning officer - - - - 336
See Taxation of Costs.

SCIRE FACIAS—Validity of patent - 355
See Threatening Legal Proceedings.

SECRET PREPARATION—Right to name of discoverer - - - - 421
See Right to Name of Discoverer.

SEPARATE ESTATE — Pauper lunatic in *Australia* - - - - 168
See Maintenance of Lunatic.

SEPARATION DEED—*Custody of Children—Lawful Agreement—Specific Performance—Covenant to deliver up private Documents—Making and Retaining Copies.*] The Court will enforce a legal and proper covenant in a separation deed although other covenants in the same deed may be illegal.—By a separation deed, made after the wife had instituted proceedings in the Divorce Court for divorce and the custody of her children, the husband covenanted to deliver up forthwith to his wife all her journals, diaries, and private correspondence and memoranda; that the elder two children of the marriage should remain at such schools in *England* as the husband, or such schools elsewhere as the husband, with the consent of the wife, should direct; that the husband and wife should each have access to them at all reasonable and convenient times, subject to the regulations of the schools; and that their holidays should be passed by them at such places and in such manner as the trustees of the deed should direct; and that the younger two children (who were respectively under the age of seven years) should remain in the custody of the wife:—*Held*, that the husband was not entitled to make or retain copies of the journals, diaries, and memoranda covenanted to be delivered up:—*Held*, also, that having regard to the evidence with respect to the husband's misconduct, the covenants with respect to the holidays of the elder two children were reasonable and proper, and would be enforced by the Court, even if the covenant as to the custody of the younger children were not legal, as to which however the Court expressed no opinion.—*Vansittart* v. *Vansittart* (2 De G. & J. 249) and *Swift* v. *Swift* (34 Beav. 394) considered. Hamilton *v.* Hector [511

SERVICE—Substituted - - 77, 461
See Substituted Service. 1, 2.

SETTLED ESTATES ACTS—19 & 20 *Vict. c.* 120; 21 & 22 *Vict. c.* 77; 27 & 28 *Vict. c.* 45, *s.* 25—*Investment—Practice in Accountant's-General's Office—Request.*] An undivided moiety in land was ordered under the *Settled Estates Act* to be sold, and the proceeds to be paid into Court and invested in Consols. The sale was made, and the money paid into Court, but there being no request to invest left at the office, the money, according to the practice in the office, remained uninvested.

SETTLED ESTATES ACTS—*continued.*
A motion for leave to bring an action against the Accountant-General, or to examine the precedents in the office, refused with costs. *In re* Woodcock's Settled Estates - - - 183

SETTLEMENT—Conversion—Power of sale 23
See Conversion. 1.

—— Investment of funds - - 232, 608
See Investment by Trustees. 1, 2.

—— Marriage—Covenant to settle future property - - - - - 295
See Covenant to settle.

SHARES—Navigation company—Conversion into personal estate - - - 470
See Conversion. 3.

—— Qualification of director - - 30
See Acceptance of Shares. 1.

SOLICITOR—Discharge of - - - 440
See Solicitor's Lien. 1.

—— Employment of—Infant - - 497
See Solicitor's Lien. 2.

—— Lien - - - - 440, 497
See Solicitor's Lien. 1, 2.

—— Returning officer at election of school board—Charges - - - 336
See Taxation of Costs.

SOLICITOR'S LIEN—*Discharge by Solicitor—Demand for Funds to carry on Suit.*] Where a solicitor applied to his client for funds to carry on a suit, and upon the client not furnishing any declined to continue to conduct the litigation, and the client appointed fresh solicitors:—*Held*, that this was a discharge by the solicitor, and that he might be called upon to deliver to the new solicitors the papers relating to the matters in question in the suit, on their undertaking to hold them without prejudice to his lien and to return them undefaced within twelve days after the conclusion of the suit, and to allow the former solicitor access to them for the purpose of carrying on an action for his costs. Robins *v.* Goldingham - 440

2. —— *Friendly Suit—Infant Plaintiff—Adoption of Suit—Charge on Real Estate "preserved"*—22 & 23 *Vict. c.* 127, *s.* 28.] The bill in this suit was filed on the 15th of June, 1863, by *M. J.*, as next friend of the then infant Plaintiff, for a guardian, directions as to the maintenance of the Plaintiff and his brothers and sisters (Defendants), accounts of the estate of the testator (their grandfather), and for a receiver. The solicitor employed by the next friend was a Mr. *J.* On the 4th of July a decree was made, directing inquiries as to the testator's real estate; and on the 6th of February, 1864, the Chief Clerk made his certificate that the real estate was worth about £350 per annum. On the 2nd of March, 1864, an order was made for the appointment of a guardian and receiver, and allowing a sum of £220 per annum for the maintenance of the Plaintiff and the Defendants. On the 10th of August, 1866, Mr. *J.*, the solicitor, died. On the 14th of October, 1867, the infant Plaintiff attained twenty-one years of age. In November, 1867, he disentailed the real estate (of which he was tenant in tail under his grandfather's will). In June, 1868, he obtained an order to discharge the receiver;

SOLICITOR'S LIEN—*continued.*
and on the 10th of February, 1872, procured an order to change his solicitor. On a petition presented under the 22 & 23 Vict. c. 127, by the personal representative of the solicitor, to establish a charge on the real estate for *J.'s* costs:—*Held*, that the suit was properly instituted, and the solicitor duly "employed" on behalf of the infant; that the property was "preserved" in the suit for the benefit of the infant through the instrumentality of the solicitor; that the infant had, on attaining twenty-one, adopted the suit; that the *Statute of Limitations* was not a bar to the claim; that the personal representative of the solicitor could present the petition; and that an order must be made upon it. Baile *v.* Baile - - 497

SOLVENCY—Libel as to - - - - 619
See Injury to Reputation.

SPECIAL CASE—*Practice—Marriage of Female Party—Amendment.*] Where a female party to a special case has married since it was set down for hearing, the proper course is to discharge the order for the hearing and amend the case by adding the husband as a party, and to apply for leave to set it down afresh. Atty *v.* Etough - 462

—— Infant born after filing - - - 250
See Failure of Purpose of Legacy.

SPECIAL EXAMINER — *Practice — Company — Winding-up.*] A person summoned under the *Companies Act*, 1862, s. 115, to give information respecting the affairs of a company which is being wound up by the Court, is not entitled to any voice in the appointment of a special examiner. *In re* Contract Corporation - - - 27

SPECIFIC PERFORMANCE—Agreement to execute mortgage - - - 76
See Agreement for Mortgage.

—— Sale by Court - - - - 196
See Conditions of Sale.

—— Vendor's lien—Railway company 261, 524
See Vendor's Lien against Railway Company. 1, 2.

—— Works on plaintiff's land - - 45
See Specific Performance of Works on Plaintiff's Land.

SPECIFIC PERFORMANCE OF WORKS ON PLAINTIFF'S LAND — *Railway Company and Landowner—Agreement by a Railway Company to make Accommodation Works on Land of a Vendor other than that taken by the Company.*] An agreement was entered into between a railway company and a landowner, part of whose land had been, under another agreement, taken by the company, whereby, in consideration of the previous withdrawal by the landowner of a petition to Parliament against the company's bill, the company agreed to construct and for ever maintain at their expense a siding of specified length alongside the line upon land belonging to the landowner, and to be provided by him for that purpose, for the use and to the reasonable satisfaction of the landowner:—*Held*, that this agreement was not incapable of being enforced by a Court of Equity.—The Court will not refuse to decree specific performance of an agreement, although the Plaintiff may have a concurrent remedy in damages, or

SPECIFIC PERFORMANCE OF WORKS ON PLAINTIFF'S LAND—*continued.*
may have entered into a negotiation for a money compensation which has failed. Greene *v.* West Cheshire Railway Company - - 44

STAMP—Unstamped letter - - - 529
See Mutual Insurance Society.

STATUTE OF DISTRIBUTIONS - - 286
See Distributions, Statute of.

STATUTE OF LIMITATIONS - - 281
See Limitations, Statute of.

STATUTES:
22 & 23 Car. 2, s. 10—*Distributions* - 286
See Distributions, Statute of.
29 Car. 2, c. 3—*Frauds* - - - 191
See Agreement by Letters.
4 Geo. 4, c. 76, s. 22—*Marriage Act* - 369
See Undue Publication of Banns.
9 Geo. 4, c. 14, s. 8—*Limitations* - - 281
See Limitations, Statute of.
6 & 7 Will. 4, c. 26—*Newspapers* - - 394
See Libel in Newspaper.
1 Vict. c. 26, ss. 15, 34—*Wills* - - 381
See Republication of Will.
—— —— s. 27 - - - - 163
See Appointment by Residuary Gift.
6 & 7 Vict. c. 73—*Solicitors* - - 336
See Taxation of Costs.
8 Vict. c. 18, ss. 34, 75, 80—*Lands Clauses* 524
See Vendor's Lien against Railway Company. 2.
—— —— ss. 69, 80 - - 334, 495
See Costs under Lands Clauses Act. 1, 2.
—— —— s. 78 - - - - 564
See Payment out of Court.
10 & 11 Vict. c. 96—*Trustee Relief Act* - 532
See French Curator Bonis.
14 & 15 Vict. c. 99, s. 14—*Evidence* - 611
See Evidence of Death.
15 & 16 Vict. c. 55, s. 2—*Trustee Act* - 26
See Trustee Acts. 1.
15 & 16 Vict. c. 80—*Masters in Chancery* 349
See Sale before Chief Clerk.
15 & 16 Vict. c. 86, s. 40—*Chancery Improvement* - - - - 401
See Motion reserved till the Hearing.
—— —— s. 44 - - - - 139
See Appointment of Representative.
—— —— s. 52 - - - - 202
See Revivor and Supplement. 2.
16 & 17 Vict. c. 137—*Charitable Trusts* - 269
See Endowed Schools Act.
17 & 18 Vict. c. 36, s. 7—*Bills of Sale* - 597
See Pledge of Chattels in Scotland.
17 & 18 Vict. c. 113—*Locke King's Act* - 218
See Locke King's Act. 1.
18 & 19 Vict. c. 124—*Charitable Trusts* - 269
See Endowed Schools Act.
19 & 20 Vict. c. 120—*Settled Estates* - 183
See Settled Estates Act.
21 & 22 Vict. c. 77—*Settled Estates* - 183
See Settled Estates Act.

STATUTES—*continued.*

22 & 23 Vict. c. 25—*Law of Property* - 434
See Breach of Trust by Testator.

22 & 23 Vict. c. 127, s. 28—*Solicitors* - 497
See Solicitor's Lien. 2.

24 & 25 Vict. c. 134, ss. 153, 154—*Bankruptcy* - - - - 66
See Bankrupt Transferee.

25 & 26 Vict. c. 53, s. 17—*Land Registry* 142
See Land Registry Act.

25 & 26 Vict. c. 89, s. 38—*Companies* - 388
See Costs in Winding-up.

—— —— s. 115 - - - 178, 179, n.
See Witness in Winding-up. 1, 2.

—— —— —— - - - - 27
See Special Examiner.

—— —— —— - - - - 566
See Application for Shares.

—— —— s. 158 - - - - 623
See Interest in Winding-up.

25 & 26 Vict. c. 102, ss. 73, 107—*Metropolis Management* - - - 339
See General Line of Buildings.

25 & 26 Vict. c. 108—*Confirmation of Sales* [408, 634
See Confirmation of Sales Act. 1, 2.

27 & 28 Vict. c. 45, s. 25—*Settled Estates* 183
See Settled Estates Act.

29 & 30 Vict. c. 122—*Metropolitan Commons*
See Metropolitan Commons Act. [574

30 & 31 Vict. c. 69—*Charges on Real Estate*
See Locke King's Act. 1, 2. [218, 493

31 & 32 Vict. c. 40, ss. 3, 4 173, 175, n., 280,
See Partition Suit. 1—5. [406, 492

32 & 33 Vict. c. 24—*Newspapers* - 394
See Libel in Newspaper.

32 & 33 Vict. c. 56—*Endowed Schools* - 269
See Endowed Schools Act.

32 & 33 Vict. c. 71, ss. 6, 59, 80—*Bankruptcy* 638
See Place of Business.

—— —— s. 23 - - - - 186
See Disclaimer by Trustee in Bankruptcy.

—— —— s. 15 - - - - 597
See Pledge of Chattels in Scotland.

—— —— ss. 55, 72, 96 - - - 409
See Examination of Trustee.

—— —— s. 72 - - - - 311
See Injunction in Bankruptcy.

—— —— s. 87 - - - - 314
See Execution Creditor.

—— —— s. 125 - - - - 464
See Forfeiture Clause. 2.

33 & 34 Vict. c. 71—*National Debt* - 611
See Evidence of Death.

33 & 34 Vict. c. 75—*Elementary Education* 336
See Taxation of Costs.

33 & 34 Vict. c. 99—*Repeal of Statutes* - 394
See Libel in Newspaper.

34 & 35 Vict. c. 86—*Regulation of Army* - 250
See Failure of Purpose of Legacy.

STAYING PROCEEDINGS — Pending suit in French Court - - - 362
See Lis Alibi Pendens.

STOCK EXCHANGE—Custom of - - 203
See Custom of Stock Exchange.

SUBSCRIBER OF MEMORANDUM—*Contributory—Contract to take Shares—Acceptance of Office as Director—Resignation by Director—Lapse of Five Years.*] *S.* in 1865 agreed to become a director of a company, and signed the memorandum of association for 200 shares. The articles of association empowered the directors to decline to commence business unless two-thirds of the capital were subscribed. *S.* attended the first meeting of the directors, and having unsuccessfully opposed a resolution to commence business before two-thirds of the capital had been subscribed, stated that he should resign his directorship; but, at the request of the directors, postponed his resignation till a further day, when it was accepted. The company carried on business and made some dividends, but was in February, 1870, ordered to be wound up. *S.* was not treated as a member of the company after his resignation, and no shares were allotted to him, and his name was never placed on the list of shareholders:—*Held*, that he was not by the lapse of time, and by the circumstances of the case, exonerated from liability to take the shares for which he had subscribed the memorandum of association. *In rè* Robinson & Preston's Brewery Company. Sidney's Case - - - 228

SUBSTITUTED SERVICE—*Partners—Appearance.*] In a suit against five partners, three of whom had entered appearance and the other two were out of the jurisdiction and had not, substituted service of a notice of motion for an injunction, and for the appointment of a receiver on any of the three partners for the two, was allowed. Leese *v.* Martin - - - 77

2. —— *Notice of Motion for Decree—Heir-at-Law.*] In a creditor's administration suit for real and personal estate of an intestate the heir-at-law had gone out of the jurisdiction of the Court after service of the bill, but without having appeared. The real estate having been sold by the mortgagee, and an appearance having been entered for the heir-at-law:—*Held*, that substituted service of the notice of motion for decree upon the administratrix for the heir was sufficient. Deanes *v.* Kitchin - - 461

SUMMONS—Metropolitan Management Act 339
See General Line of Buildings.

SUMMONS TO EXAMINE WITNESS—Winding-up - - - - 178, 179, n.
See Witness in Winding-up. 1, 2.

SUPPLEMENTAL ORDER—Certificate filed in—Suit when defective - - 202
See Revivor and Supplement. 2.

SURETY — Company — Claim for interest in winding-up - - - - 623
See Interest in Winding-up.

—— Marshalling securities - - - 158
See Marshalling.

TACKING BY MORTGAGEE—*Mortgagee of Testator—Unsecured Debt—Balance of Policy Moneys—Right to retain or tack.*] The mortgagees of a policy of assurance, mortgaged to them by a deceased testator to secure a sum of money, received after the testator's death, under the policy, a sum exceeding the amount due to them for principal and interest in respect of the mortgage debt. They were also creditors of the testator for other debts not secured:—*Held*, that they were entitled to retain the balance in their hands in discharge of their unsecured debts.—*Spalding* v. *Thompson* (26 Beav. 637) followed. *In re* Haselfoot's Estate. Chauntler's Claim. [327

TAXATION OF COSTS—*Solicitor—Returning Officer for Election of School Board—Elementary Education Act*, 1870—*Bill of Costs.*] A solicitor, who was appointed returning officer for the election of a school board under the *Elementary Education Act*, 1870, sent in a bill of his charges in the usual form of a solicitor's bill of costs, including both the election charges proper, and attendance at the board after the election was over. On a motion to discharge the common order for taxation:—*Held*, that, as he had by the form of his bill of costs constituted himself solicitor to the board, the bill in question was liable to taxation. *In re* Jones - - 336

TENANT IN COMMON—Gift to all and every the child and children - - 28
See Joint Tenancy or Tenancy in Common. 1.

—— Will—Construction—"Between" - 128
See Joint Tenancy or Tenancy in Common. 2.

TENANT FOR LIFE AND REMAINDERMAN—Forfeiture of life estate - - 464
See Forfeiture Clause. 2.

—— Royalties—Brickfield - - - 263
See Royalty.

TESTAMENTARY GUARDIAN—*Guardian and Ward—Illegitimate Children—Trustee and Cestui que Trust—Breach of Trust—Acquiescence.*] A testator cannot by will lawfully appoint any one to be guardian of his illegitimate children.—A testamentary guardian is a trustee of such property as comes to his hands in that character.—A testator died in 1810 in *India*, having bequeathed his English property to two infants, whom he acknowledged as his natural children; and having appointed his nephew, *D. E.*, to be their guardian. Part of his property consisted of a bond, dated in 1810, in which he was obligee, the obligor being seised of real estate in *Ireland*. In 1811 *D. E.* obtained possession of the bond from the testator's executor; but he did not register it, nor did he (as it was stated and admitted on demurrer) ever take any steps towards realizing the security. In 1821 the elder of the infants attained twenty-one; in 1832 she married; and in 1833, when (as alleged and admitted on demurrer) the bond had become irrecoverable, *D. E.*, for the first time, informed the elder child and her husband, who were co-Plaintiffs, of the existence of the bond; and upon finding it was then too late to register it, he handed it to the male Plaintiff, directing him to

TESTAMENTARY GUARDIAN—*continued.*
see to it.—No step was taken until *D. E.'s* death in 1870, after which, in 1871, the bill was filed, seeking to make *D. E.'s* estate liable as for a breach of trust. At this time the younger infant was dead, and had no legal personal representative; but his son, who was entitled to administer, was made a Defendant.—*Semble*, *D. E.* was not at any time liable for any breach of trust; but if he was:—*Held*, that the Plaintiffs, by acquiescing for thirty-eight years, and waiting till *D. E.'s* death, had lost their right to make any claim against his estate; and demurrer to the bill allowed.—*Quære*, whether the bill was not defective for want of parties. Sleeman *v.* Wilson 36

THREATENING LEGAL PROCEEDINGS—*Injunction—Validity of Patent—Restraining Publication—Scire facias to try the Validity of a Patent.*] There is no presumption in law in favour of the validity of a patent, and therefore a patentee is not entitled to publish statements of his intention to institute legal proceedings, in order to deter persons from purchasing alleged infringements of his patent, if he has no *bonâ fide* intention to follow up his threats by taking such proceedings, and the Court will in such case restrain him from making such publication.—A person alleging the invalidity of a patent is not bound to assert his claim by *scire facias*, in order to establish his right to restrain the publication of statements by the patentee, threatening with legal proceedings persons buying articles of his manufacture alleged to be infringements of the patent. Rollins *v.* Hinks - - - 355

TITLE—Commencement of - - - 196
See Conditions of Sale.

TRADER—Bankruptcy Act, 1869 - - 314
See Execution Creditor.

TRANSFER OF SHARES—Custom of Stock Exchange - - - - 203
See Custom of Stock Exchange.

TRUST—Breach of—Testamentary guardian—Acquiescence - - - 36
See Testamentary Guardian.

—— Breach of, by testator—Liability of executor - - - - 434
See Breach of Trust by Testator.

—— Resulting—Conversion by will - 133
See Conversion. 2.

TRUSTEE—Appointment of new—Trustee Act
See Trustee Acts. 2. [333

—— Bankruptcy—Disclaimer - - 186
See Disclaimer by Trustees in Bankruptcy.

—— Bankruptcy—Examination of - 409
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—— Death of—Administration suit—Representative - - - - 139
See Appointment of Representative.

—— Discretion—Sale of brickfield - 263
See Royalty.

—— Investment by - - - 232, 608
See Investment by Trustees. 1, 2.

—— Liability—Duty to call in investments of shares in unlimited company.
See Investment by Trustees. 1.

TRUSTEE—*continued.*
—— Payment to, under Lands Clauses Act 564
See Payment out of Court.
—— Relief Act — Lunatic — French *curator bonis* - - - - - 532
See French Curator Bonis.
—— Retiring—No successor to be found—Trustee Act - - - - - 333
See Trustee Acts. 2.
—— Testamentary guardian - - 36
See Testamentary Guardian.

TRUSTEE ACTS—*Mortgage—Covenant to surrender Copyholds—Trustee Extension Act*, 1852, *s.* 2—*Petition by Mortgagee for Vesting Order—Service on Mortgagor.*] Where a mortgagor, who has covenanted to surrender copyholds to his mortgagee, and has neglected to make such surrender within twenty-eight days after demand and tender of engrossment by the mortgagee, the Court will, on the petition of the mortgagee, make a vesting order under sect. 2 of the *Trustee Extension Act*, 1852, without requiring service of the petition on the mortgagor. *In re* Crowe's Mortgage - 26

2. —— *Retiring Trustee — Impossibility of finding Successor — Appointment of Continuing Trustees in place of Continuing and Retiring Trustees.*] When a trustee wishes to retire, and a successor cannot be found, the Court can appoint the continuing trustees to be sole trustees in the place of the continuing and retiring trustees. *In re* Stokes' Trusts - - 333

ULTRA VIRES—Cancellation of shares—Release of shareholder - - 437, 474
See Cancellation of Shares, 1, 2.

UNDUE PUBLICATION OF BANNS—*Marriage Act*, 4 *Geo.* 4, *c.* 76, *s.* 22—*Proof required of concurrence "knowingly and wilfully" by both Parties—Evidence—Costs of Trustee*]. A marriage solemnized after an undue publication of banns will not be held null and void under the provisions of the *Marriage Act* of 1823, unless it be shewn that both parties "knowingly and wilfully," concurred in such undue publication.— Where an intending husband, then a minor, and desiring to have a secret marriage, gave instructions for the publication of banns, and in such instructions omitted two of his own Christian names and one of the Christian names of his intended wife (also a minor), and the names were entered with such omissions in the register of banns—there being no evidence of how the banns were actually published—and the names were, after the ceremony, signed by the respective parties, with the same omissions, in the register, there being no further evidence besides that of the husband, who deposed that he omitted the names, not thinking or believing he was acting contrary to law, and for brevity's sake only, and the marriage having been reputed good for more than thirty years:—*Held*, that the husband was not proved to have committed any offence against the statute.—The husband deposed that prior to the marriage the intended wife neither directly nor indirectly took any step towards the publication of the banns, but left the matter entirely to him. There was no evidence of knowledge on her part beyond her signature of the marriage register with the omission above mentioned, that not being her usual form of signature. She being dead, and the marriage having been reputed good throughout her life—that is to say, for upwards of twenty-four years:—*Held*, that the Court could not impute to the wife knowledge of the omission of the name in the instructions for publication of banns.—Costs disallowed to a trustee severing in proceedings from his co-trustee. Gompertz *v.* Kensit - - 369

UNLIMITED COMPANY—Shares in—Liability of trustees - - - - 232
See Investment by Trustees. 1.

UNREGISTERED LIFE INSURANCE COMPANY—*Creditor—Liability limited by Contract—Inability to continue Business—Damages for Breach of Contract.*] An unregistered assurance society issued policies under which the assets of the company alone were liable. The company, being insolvent, was registered as an unlimited company, under the Act of 1862, and immediately afterwards ordered to be wound up:—*Held*, that the shareholders were liable beyond the amount of their shares for the expenses of the winding-up; but that there was no liability beyond the amount of the shares for any breach of contract involved in ceasing to carry on business. Lethbridge *v.* Adams. *Ex parte* Liquidator of the International Life Assurance Society - - 547

UNSOUND MIND—Person of—Voluntary deed 485
See Voluntary Deed.

UNSTAMPED LETTER—Mutual insurance society—Reference to rules - - 529
See Mutual Insurance Society.

VALIDITY OF PATENT—Presumption in favour of - - - - - 355
See Threatening Legal Proceedings.

VENDOR AND PURCHASER—Metropolitan Commons Act—Sale to Board of Works. 514
See Metropolitan Commons Act.
—— Mistake in conveyance—Rectification 427
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—— Rescinded contract—Death of purchaser before rescission - - - 417
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VENDOR'S LIEN AGAINST RAILWAY COMPANY—*Injunction.*] The Court will not, for the purpose of enforcing the lien of an unpaid vendor against a railway company for his purchase and compensation money, interest, and costs, restrain the company from running trains or engines over the land until the sale (directed by the order) of the land agreed to be taken. *Earl St. Germans* v. *Crystal Palace Railway Company* (Law Rep. 11 Eq. 568) not followed. Lycett *v.* Stafford and Uttoxeter Railway Company - - - - - 261

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2.——*Costs of Arbitration—Lands Clauses Act*, 1845, *ss.* 34, 75, 80.] Where land is taken by a railway company, and the purchase-money is ascertained by arbitration under the *Lands Clauses Act*, 1845, the vendor is not entitled to a lien on the land sold for the costs of the arbitration payable to him by the company. Earl Ferrers *v.* Stafford and Uttoxeter Railway Company - - - - - 524

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VOLUNTARY DEED—*Apprehension of Conviction—Person of unsound Mind.*] *A.*, being in prison on a charge of felony, in order to avoid a forfeiture of his property in the event of a conviction, executed a voluntary deed, assigning his personal estate to *B.*, his brother, absolutely. *A.* was tried, found not guilty, on the ground of insanity, and ordered to be imprisoned as a lunatic during Her Majesty's pleasure:—*Held*, that the deed, being without consideration, and executed by an insane person under a total misapprehension, was inoperative, and that the representatives of *B.* took no interest under it. Manning *v.* Gill 485

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WITNESS IN WINDING-UP—*Companies Act*, 1862, *s.* 115—*Summons to examine a Witness.*] A mother-in-law of a contributory having declined to give liquidators any information as to his address, a summons was, under the 115th section of the *Companies Act*, 1862, ordered to be issued for her examination. *In re* Bank of Hindustan, China, and Japan. Fricker's Case - 178

2. —— *Companies Act*, 1862, *s.* 115.] Shares having been transferred into the name of an infant, a summons was ordered to be issued under the 115th section of the *Companies Act*, 1862, for the examination of the broker who acted in the transfer, for the purpose of explaining the circumstances. *In re* Mercantile Credit Association. Clement's Case - - - 179, n.

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